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MASTER'S THESIS

LAWRENCE RICHARD MALOPY

SAN DIEGO STATE UNIVERSITY

1974

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NATIONAL SECURITY AND INTERNATIONAL STRAITS

A Thesis

Presented to the

Faculty of

San Diego State University

In Partial Fulfillment

of the Requirements for the Degree

Master of Arts

in

Political Science

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by

Lawrence Richard Malopy

December 1974

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NATIONAL SECURITY AND INTERNATIONAL STRAITS

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INTRODUCTION

> Control of the seas can mean peace. Control of the seas can mean victory. If there is any lesson of the twentieth century, especially of the last few years, it is that in spite of the advancement in space and in air, this country must still move easily and safely across the seas of the world. Knowledge of the oceans is more than a matter of curiosity, our very survival may hinge on it.[1]

An increase in the growth of the world's population coupled with new technology is placing intense pressure on the development of ocean resources. In order to establish peaceful methods for utilizing these resources the United Nations convened the Third Law of the Sea Conference in Caracas, Venezuela during the summer of 1974. One of the key questions that the Conference failed to reach agreement on was the width of the territorial seas[2] and the right to unimpeded passage through these waters when they form part of the sea known as an "international strait."[3]

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[1]From a speech made by John F. Kennedy aboard the aircraft carrier Kitty Hawk in 1963, cited by Hanson Baldwin, *Strategy for Tomorrow* (New York: Harper & Rowe, 1970), p. 292.

[2]The territorial sea is measured from the low water line or "baseline" to some distance seaward that the state declares as the width of its territorial sea. See Appendix A.

[3]Chapter I provides a detailed discussion of

Repeated failure to agree on a satisfactory international regime for territorial seas and international straits is associated with the differing conceptions of "national security"[1] held by nations. Since the end of World War II, nations have tended to expand their national sovereignty over the seas that border their coasts. In addition, there has been an increase in the number of sovereign states, each with its own claim upon the sea.[2] The cause for the seaward stretch of national sovereignty is economic but often defended in terms of being essential to the security of the nation. The extension of state sovereignty into areas that were formerly "res nullius" has brought many of the nations of the world into conflict. This is particularly true where a state's seaward boundary encompasses transit routes for world shipping and air

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what is meant by the term "international strait." In general, the term can be taken to mean any narrows connecting the high seas and used for communications by more than one state.

[1]There are probably as many definitions of "national security" as there are authors writing on the subject. A good survey of the various views held can be found in U.S., Congress, House, Committee on Foreign Affairs, *National Security Policy and the Changing World Power Alignment, Hearings before the Subcommittee on National Security Policy and Scientific Development*, 92nd Cong., 2nd sess., May-August 1972.

[2]The number went from 55 to today's 138.

communications, most typically at the focal points of international straits.

This study will attempt to examine the relationship between national security considerations and freedom for unimpeded passage through international straits. The analysis will be pursued from the perspective of U.S. national policy as set forth for the United Nations Third Law of the Sea Conference, convened in the summer of 1974.[1]

There are two major aspects of the policy that deserve study. First, what is the policy and what are the domestic political issues involved in its formation? This leads to an examination of the question of how the national security of the United States is seen to be involved in unimpeded passage through international straits. The policy has been attacked domestically as favoring Department of Defense interests

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[1]The "non-negotiable" position of the U.S. was that acceptance of expanded territorial seas to a width of 12 miles was contingent upon the right of free or unimpeded passage through international straits and an overall settlement of issues. "Statement by the Honorable John Norton Moore, Chairman of the NSC Interagency Task Force on the Law of the Sea, on the occasion of oversight Hearings on the Outer Continental Shelf Lands Act before the House Committee on the Judiciary, Subcommittee on Immigration, Citizenship, and International Law." (Mimeographed.) March 14, 1974, p. 4. Hereafter referred to as the Moore Statement of March 14, 1974.

over that of more important considerations, specifically, an international agreement on the development of resources in the ocean.[1] What evidence is there that other interests have been subordinated to Defense Department policy?

In addition to the domestic significance of American policy for the international law of the sea, another aspect is how has the U.S. policy been received in the arena of international politics? American policy would place the interest of world shipping and air communications, both civil and military, over the sovereign rights that a state has over its territory. Is there any basis in international law for such a position? Does international law provide any guidance in solving the dilemma that arises when the national security requirements of one state adversely affect the national security requirements of other states?

The thesis of this paper is that the national security interests of America and the peace of the world are best served through unimpeded passage of international straits. The thesis will be advanced by

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[1]Two opponents have been S. Brown and L. Fabian, "Diplomats at Sea," *Foreign Affairs* 52 (January 1974): 320.

setting forth the U.S. policy, the objections to that policy, and the facts supporting that policy.

The work is organized into four chapters and a conclusion. It will first be necessary to examine the policy of the United States toward the international law of the sea, and the domestic and foreign objections to it. This will be accomplished in the first chapter of the paper. The second chapter will be devoted to establishing the views which oppose domestic critics. The third chapter will attempt to answer the objections of foreign opponents of American policy, particularly as they pertain to international law. Fourth, a synthesis will be made in an attempt to understand the problems involved.

CHAPTER I

THE ISSUES

> The Department of Defense should be called upon, in executive session if necessary, to explain the basis for Article II [free transit through international straits as proposed in U.S. Draft Articles for the Third Law of the Sea Conference] in terms of national security and to explain the basis of making Article II a non-negotiable element of United States oceans policy.[1]

> The notion of "free transit" through straits which form part of the territorial sea is unknown to state practice and cannot offer an adequate solution to the problem [balancing interests], because it would alter the existing balance of interests between the coastal and noncoastal states, and derogate the sovereignty of the former over their territorial seas.[2]

Background

What is meant by the term "international strait"? The most exhaustive work on the international straits was done by a Dane, Erik Brüel, who wrote a

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[1]U.S., Congress, House, Committee on Foreign Affairs, *Law of the Sea and Peaceful Uses of the Seabeds, Hearings before the Subcommittee on International Organizations and Movements*, 92nd Cong., 2nd sess., April 10 & 11, 1972, p. 77.

[2]Jose A. de Yturriaga, "Navigation through the Territorial Sea Including Straits Used for International Navigation," *Hazards of Maritime Transit*, ed. T. A. Clingan and L. M. Alexander (Cambridge, Mass.: Ballinger Publishing Co., 1973), p. 87.

treatise on the subject just prior to the outbreak of World War II.[1] Brüel investigated both the linguistic and geographic definition of the term "strait." Linguistically, a strait has the characteristics of "passage," "narrowness," and "separation." Geographically speaking a strait must first be part of the sea (this would eliminate man-made canals such as the Kiel, Suez, and Panama). Secondly, it must connect two bodies of water which otherwise would be separated either totally or to a great extent in that particular locale. Third, it must be narrower than adjoining waters and must separate two areas of land. Most important for Brüel, and for our particular analysis is the *function* that the strait serves. If a strait functions as a means of communication by more than a single state, then it is international in character and becomes an "international" strait and subject to international law.[2]

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[1]Erik Brüel, *International Straits: A Treatise on International Law*, 2 vols. (London: Sweet & Maxwell, Ltd., 1947).

[2]A few examples will support the importance which Brüel attached to the function of a strait in determining its international character. The easiest and most economical crossing between two land areas that are separated by the sea is at the point where the two masses are closest together. Ferrying stations are established at these places. A state may have both

Brüel did not consider the number of ship passages important in determining the international character of a strait. He was supported in this by the International Court of Justice (ICJ). The Albanian government argued before the ICJ in 1949 that the Corfu Channel was not an international strait because it was of minor importance to international commerce. The decision of the International Court of Justice is instructive when one seeks a definition of an international strait, viz.

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sides of the strait within its jurisdiction, such as Turkey and the Dardanelles. However, this crossing point is significant to countries adjacent to it and the economies of countries far removed. Reflection upon the importance of the Turkish straits to past European commerce with the orient will support this.

Straits are also the focus of attention and action when shores are under the jurisdiction of differt nations, either in time of war or time of peace. The English Channel was of equal importance when it protected England from French invasion during the Napoleonic Wars, and when it provided the easiest invasion route for the Allies when driving the German armies out of France in World War II. Its prominence has not diminished in times of peace, as witnessed by the joint Anglo-French efforts at establishing a "Chunnel" under it for the promotion of commerce between the two countries.

Straits function as a natural focal point for sea and airborne commerce. Ships and planes of many nations often require their use. Straits can thus affect not only the economy of the state or states who have jurisdiction over the area where they are located but the economy of the nation whose flag the craft flies, the nation from which the goods are being shipped, and the nation who will receive the goods.

> It may be asked whether the test [for an international strait] is to be found in the volume of traffic passing through the strait or in its greater or lesser importance for international navigation. But in the opinion of the Court the decisive criterion is rather its geographical situation as connecting two parts of the high seas and the fact of its being used for international navigation.[1]

Combining the important aspects of the various concepts of an international strait, one might find the following definition acceptable. An international strait is a natural narrows connecting two parts of the high seas and used for communication by two or more states.

There is no generally agreed upon list of international straits. Appendix B is a list of straits and channels, some of which would be clearly "international straits," others might be questionable. However, based upon our definition, it would be difficult to deny the international character of the below listed straits.[2] These straits are arranged in order of decreasing number of ship passages per year:

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[1]L. C. Green, *International Law through the Cases* (London: Stevens & Sons, Ltd., 1970), p. 261.

[2]R. D. Hodgson and T. V. McIntyre, "Maritime Commerce in Selected Areas of High Concentration," *Hazards of Maritime Transit*, pp. 1-17.

1. English Channel/Strait of Dover (110,000)
2. Danish Straits (40,000-50,000)
3. Strait of Hormuz (36,500)
4. Strait of Gibraltar (18,000 before the closing of the Suez Canal)
5. The Dardanelles/Bosporus (at least 10,000)
6. Singapore/Malacca (10,000)
7. Mozambique Channel (at least 7,500)

To this list could be added the following, although exact figures for ship traffic are not available:

8. Bashi Channel
9. Strait of Florida
10. Windward Passage

Appendix C provides a general idea of the location of these major international straits.

International straits have historically played an important role in the security of nations. The Iliad of Homer, written about 800 B.C., describes the destruction of Troy or "Ilium" situated in the center of a fertile plain on the southern shore of the Hellespont (now the Dardanelles) in northwest Asia Minor. At the time of its destruction (approximately 1200 B.C.), Troy controlled access to the rich wheat growing regions of the Crimea. It was natural that it

began collecting toll charges from ships sailing to and from the Black Sea. It is commonly held by historians that:

> Troy perished not because of a beautiful woman . . . but probably because of trade rivalries between the Trojans and the Achaean peoples of the Greek mainland.[1]

Historical examples may be cited in connection with other straits. During the Napoleonic Wars, France pressured Denmark, Sweden, Prussia, and Russia to pledge themselves to an armed neutrality against England. Denmark's participation was especially damaging to England. British warships were dependent upon naval stores originating from the Baltic. These stores had to pass through the Danish Straits to reach England. In order to assure their passage, British warships attacked Copenhagen in October of 1801 and forced the Danes into a treaty with England.[2]

Hitler's decision to invade Norway and Denmark in 1940 was based upon the fear that the Allies would gain control of the Danish Straits, thus blockading the Baltic. This would stop 11,000,000 of Germany's

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[1]*The World Book Encyclopedia*, 1965 ed., s.v. "Troy," by John H. Kent.

[2]Lynn Montross, *War through the Ages* (New York: Harper & Rowe, 1960), pp. 492-495.

15,000,000 ton annual requirement for iron ore which was shipped from Narvik through the Danish Straits.[1] It should be noted that Denmark had opened the straits to free passage of shipping, even warships, in 1913.

One final example, concerning the Strait of Tiran, should serve to illustrate that the controversy over international straits has continued to relatively recent times. In 1955, Egypt, who together with Saudi Arabia, controls the entrance to the strait leading to the Gulf of Aqaba and the Israeli port of Elath, put into effect a regulation requiring all ships which desired to pass through the straits to obtain permission 72 hours in advance. Israel, who receives about half her petroleum imports through Elath,[2] and who already was outraged by Egyptian interference with its shipping, reacted by launching a military offensive. Israeli troops invaded the Sinai Peninsula and seized Egyptian positions at Sham al Shaikh and Ras Nuzrani[3] (refer to map included as Appendix D).

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[1]Ibid., pp. 799-800.

[2]United States Department of the Interior, *Minerals Yearbook, 1971*, vol. 3 (Washington, D.C.: Government Printing Office, 1973), pp. 439-440.

[3]Charles B. Selak, Jr., "A Consideration of the Legal Status of the Gulf of Aqaba," *American Journal of International Law* 52 (October 1958): 670-671.

A general pattern of conflict emerges from the historical examples just cited. First, coastal states situated on the shores of international straits will use their favorable geographical position for their maximum political and economic advantage. Secondly, such actions by coastal states often conflict with the use of the strait by maritime nations. These nations see use of the straits as vital to their national security. This situation has often led to military action against the coastal state, which obviously is detrimental to *that* nation's security. Third, as in the case of the Nazi invasion of Denmark or the Israeli invasion of Egypt, present international law does not provide adequate protection for the national security interests of either the strait or maritime states. Fourth, referring to the attack on Copenhagen in 1801, a state may become involved in the conflict of more powerful states if its mere location is upon an international strait essential to these powers' interests.

Certain recent events, other than the Arab-Israeli clash over the Strait of Tiran, have led to a renewal of interest in the international straits. Technological advances have enabled states to utilize the resources of the sea that before were beyond their

capabilities.[1] Technology has also increased life-span as well as reducing the death rate. This has contributed to the doubling of the world population within the last 50 years.[2]

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[1]Two important developments were in drilling technology and seabed extraction. New deep sea drilling techniques allow core samples to be taken from depths as great as 20,000 ft. However, in order to exploit the wells, a "tower" must be built whose depth limitation is in the range of 400 to 450 feet. (Frank J. Berry, "Oil and Gas Interests on the Shelf," *Law of the Sea: International Rules and Organization for the Sea*, ed. L. M. Alexander [Kingston, R.I.: University of Rhode Island, 1969], p. 228.) Even this limitation may soon be overcome by the use of a completely submerged well head which is presently under development.

There have been three devices recently developed which are capable of lifting Manganese nodules from the seabed; "vacuuming," "scooping," and "air-lifting." The latter was developed by Tenneco, Inc. which invested 18 million dollars in its development. The air-lift method has successfully recovered nodules from 3,000 feet of water. (George A. Doumani, *Ocean Wealth: Policy and Potential* [Rochelle Park, N.J.: Hayden Book Co., Inc., 1973], pp. 37-38.)

[2]The Commission on Population Growth and the American Future, *Population and the American Future* (Washington, D.C.: Government Printing Office, 1972). This Presidential Commission stated that the world's population went from 1/2 billion in 1650 to 1 1/2 billion by 1900. From 1900 to 1950 the population climbed to 2 1/2 billion, and by 1970 had surpassed 3 1/2 billion. From the year 1 A.D. to 1650 A.D. the world's population increased on the average of 150,000 persons per year. Today that figure has increased to 78,000,000 per year. It has been estimated that one billion will be added to the world's population each year by this time next century.

Furthermore, in order to protect the sea's resources for use by its own increasing number of citizens, states have adopted a policy of extending their jurisdiction over portions of the sea. Some states, such as the United States, have adopted a functional approach to such extensions. Others, notably the Latin American countries, have unilaterally extended their territorial waters seaward claiming all within, on, and above to be within their sovereign jurisdiction.[1] By 1969, five states had claimed territorial seas out to 200 miles from their coastlines (see Appendix E).

The seriousness of extended claims to the seas for international commerce can be illustrated. By extending territorial seas from the traditional three miles to twelve miles, 116 straits that formerly had avenues of high seas through them would now find themselves entirely within the territorial seas of states

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[1]Some states, such as Argentina, have modified their claim so as "not to affect freedom of navigation or of air traffic." Argentina Law No. 17, 094-M 24 of 29 December, 1966 cited in United Nations, Legislative Series, *National Legislation and Treaties Relating to the Territorial Sea, the Contiguous Zone, the Continental Shelf, the High Seas and to Fishing and Conservation of the Living Resources of the Sea*, ST/LEG/SER. B/15, April 1970, p. 45.

and subject to their control.[1] A 200 mile extension would place 35 percent of the entire ocean area within the coastal states' jurisdiction.[2]

In addition to the territorial sea expansion for procuring the ocean resources for the use of a state, another concept was growing in popularity by the end of the 1950s. Archipelago states, states whose land mass consists mostly of islands, began claiming that the ocean area between their islands should be considered "internal waters"[3] and therefore under their sovereign control. This claim had serious consequences for international commerce. Some of these areas, such as the Sunda Strait, held international shipping routes.

Additional events made coastal states more zealous than ever in guarding their rights in territorial waters, especially those forming the heavily trafficked international straits. The capture of the

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[1]Letter from LCDR Dennis F. McCoy, JAGC, USN, Department of the Navy, Office of the Chief of Naval Operations, 14 February 1974.

[2]Brown and Fabian, p. 307.

[3]Sayre A. Swarztrauber, *The Three-Mile Limit of Territorial Seas* (Annapolis: U.S. Naval Institute Press, 1972), p. 190. Internal waters are those waters landward of the Baseline. See Appendix A.

U.S.S. Pueblo off the coast of Korea made coastal states conscious of the intelligence gathering capabilities of ships off their coasts. The Torrey Canyon disaster alerted states to the danger of pollution from shipwreck or collision from the new supertankers engaged in innocent passage through their waters. Finally, the crash of a U.S. plane carrying nuclear devices off the coast of Palma made coastal states aware not only of the danger presented by air traffic over their waters, but to the danger presented by their cargos (either in the form of weapons or nuclear propulsion plants) operating within their claimed jurisdiction.

Providing more stimulus for the interest of states in international straits and national security was the increasing dependence of developed countries on imported raw materials. Some of their economies and their security depend heavily upon the cheap and uninterrupted supply of these materials. Even the United States has a growing dependency on imports. Ninety percent of its bulk commerce is carried in the holds of ships.[1] In petroleum requirements alone the U.S. is

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[1]Address by VADM Robert Baldwin, USN ("A Navy Perspective of Current World Crisis") before the World Affairs Council, San Diego, California, 19 September 1974.

becoming increasingly dependent upon imports. In 1972 such imports amounted to 27 percent of domestic demand and by 1985 they will increase to 52 percent.[1] Almost the entire amount must come by sea.

In an unsuccessful effort to solve the problem of expanded claims of national sovereignty over the seas, the United Nations convened three Law of the Sea Conferences. The dates of these major conferences were 1958, 1960, and 1974. All three conferences failed to find a consensus as to what the limit of state sovereignty should be at sea and over what. In addition, the scope and number of delegates for these conferences have been expanding making agreement ever more difficult. The original issues of breadth of the territorial seas, fishing, and mineral rights were to be solved by the, then, eighty-three member nations of the United Nations at the first Law of the Sea Conference. The conference agenda was expanded to over 100 items to be resolved by the 148 participating delegations of the third conference.[2]

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[1]U.S., Congress, Senate, Committee on Interior and Insular Affairs, *Strategic Petroleum Reserves, Hearings Pursuant to S. Res. 45*, 93rd Cong., 1st sess., 1973, p. 448.

[2]"Sea Treaty Near, Policy Chief Says," *San Diego Union*, 17 July 1974, p. A-8.

It was against this setting of international events that the formation of present U.S. policy for the oceans and the use of international straits was taking place. It is important to the understanding of the relationship between international straits and national security to investigate the policy of the leading maritime country of the world and how that policy has been formed.

Prior to the late 1960s, U.S. policy for the law of the sea was largely formed within the State Department and White House. By 1968 it was realized that major seabed oil deposits were generally to be found upon the continental shelf. The National Petroleum Council, through the Department of the Interior, began urging the State Department to adopt a 200 mile territorial sea limit in order to protect these petroleum deposits from foreign encroachment. The deposits, it was argued, were vital to national security. In this they were opposed by the Department of Defense which favored a narrow territorial sea as being best for national security interests.[1]

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[1]Ann L. Hollick, "Seabeds Make Strange Politics," *Foreign Policy*, Winter 1972-1973, pp. 148-170.

In order to resolve this bureaucratic contention two actions were taken. First, a National Security Study Memorandum (NSSM) was issued in July of 1969. The NSSM provided for the establishment of an Under Secretaries' Committee in the case that agreement could not be reached between State, Defense, and Interior as to what national policy for the sea should be. Secondly, an Inter-agency Law of the Sea Task Force was established in 1970. This Task Force was under the direction of State Department Legal Advisor John Stevenson and was to coordinate all activities associated with U.S. policy on the law of the sea at the bureau level.[1]

By late 1970 the process by which U.S. policy for the use of the ocean and the law of the sea was established. First, the Inter-agency Law of the Sea Task Force tried to reach agreement between the agencies concerned which by that time included not only State, Defense, and Interior, but Commerce, Bureau of the Budget, Justice, Transportation, and the National Science Foundation. Secondly, disagreements would be sent to the Under Secretaries' Committee, chaired at that time by Elliot Richardson. Third, recommendations for alternate positions would be sent to the National

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[1]Ibid.

Security Council under the direction of the President's Special Assistant, Henry Kissinger, for review and consideration by the President. This procedure seems to have continued until the Caracas Conference,[1] with one modification. In 1972 an Advisory Committee on the Law of the Sea was formed. This committee was made up of representatives of U.S. industry that were concerned with the law of the sea negotiations taking place within the United Nations. Originally formed at the behest of the petroleum and minerals industry, its mission was to assure that the head of the U.S. Delegation to the United Nations Seabed Committee was made aware of industry's needs.[2]

National Policy

The importance which the United States' policy makers placed on passage through the international straits can be best determined by seeing how well this issue faired against competing interests. One method

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[1]Hollick, from whom most of this information has been taken, has given an accurate account of the policy formation mechanism. This was confirmed in an interview with a primary source, Capt. William Lynch, JAGC, USN, former Action Officer for the Navy Department on Law of the Sea Matters, San Diego, California, 14 September 1974.

[2]Ann L. Hollick, "United States Ocean Politics," *San Diego Law Review* 10 (May 1973): 467-501.

to do this is through examination of what U.S. policy was for the Third Law of the Sea Conference. As has been seen, the mechanism established for reaching this policy provided for inputs from all major interests.

Although there were over 100 agenda items for the Third Law of the Sea Conference, a seven-fold division of them could be made. The seven major areas of concern for which the U.S. was to develop a policy were: (1) the breadth of the territorial sea and unimpeded passage through and over international straits, (2) living resource management, (3) mineral resources of the continental shelf, (4) mineral resources of the deep seabed, (5) protection of the environment, (6) marine scientific research, and (7) the settlement of disputes.

The policy of the United States as the time of the Third Law of the Sea Conference approached was set forth on March 14, 1974. John N. Moore, who had replaced John Stevenson as Chairman of the Inter-agency Task Force on the Law of the Sea (Stevenson was made Head of the U.S. Delegation to the Conference), summarized that policy before the House of Representative's

Subcommittee on Immigration, Citizenship, and International Law.[1]

The United States' policy regarding the breadth of the territorial sea and the transit of international straits was stated as follows:

> In an attempt to develop world-wide consensus on the breadth of the territorial sea, the United States has proposed that, in the context of an overall satisfactory settlement, it would be willing to accept a 12-mile territorial sea.[2]

However,

> Because of the importance of straits as avenues for international navigation the United States has coupled its willingness to agree to a 12-mile territorial sea with recognition of a treaty right of unimpeded transit through and over straits used for international navigation.[3]

This became the declared position of the United States at the Caracas Conference on July 11, 1974.[4]

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[1]Moore statement of 14 March 1974, p. 4.

[2]Ibid. [3]Ibid.

[4]The policy for the living resources was to be "broad coastal state control over coastal and anadromous stocks coextensive with the range of each species and international management of highly migratory species."

Three main points characterized the policy for the non-living resources of the sea (petroleum and minerals interests). First, in order to encourage development of resources, a timely (by that meaning 1974-1975) international regime was to be established. Second, the regime would provide revenue sharing with the international community, particularly the developing countries. Third, any international machinery that

Certain suppositions can be drawn from Moore's statement regarding the U.S. national policy. The 12-mile limit seemed to stand the best chance for international agreement. Without agreement as to the territorial sea limit all other issues would be moot and the international community would be back to where it was in 1960. The U.S. would accept a 12-mile limit "in the context of an overall satisfactory settlement." In other words, if its other interests were protected.

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was to be established would be non-discretionary in providing access to the resources.

Policy for the protection of the marine environment was based upon a functional separation. Hazards to the environment with respect to pollution from exploration and exploitation of the seabed would be protected against by the coastal state following minimum standards set by the international community (again protection of the petroleum interests). However, hazards caused by shipping were to be protected against through IMCO.

The U.S. proposal for marine research was a two-fold one. First, any state desiring to do research within the areas where another country had coastal state jurisdiction over the resources of that area would be required to provide reasonable advanced notification of the intent. Second, the coastal state within whose resource jurisdiction the research is conducted would be allowed to participate or be represented during the research and be assisted in the interpretation of the data.

The last point concerned the settlement of disputes. This was a very important element of policy for the petroleum and minerals industries, for without it they feared the continuation of the same expropriation policies at sea that they had recently faced ashore. The U.S. proposal contained compulsory settlement of disputes by an ocean tribunal.

But even if this requirement was met, a 12-mile limit would only be acceptable if it provided for "unimpeded" vice "innocent" transit of international straits. Thus, transit of international straits played the key role in U.S. policy.

Statements by government officials support this interpretation of the primacy for unimpeded passage in our national policy. Senator Pell, Chairman of the Senate Foreign Relations Subcommittee on the Ocean and International Environment stated at the Caracas Conference that:

> We need freedom of passage for our ships, submarines--submerged--and aircraft and unless this is guaranteed, I don't believe the United States would ratify a convention.
>
> We will give away a great deal. . . . We will give up a portion of our national wealth, but not of our national security.[1]

This is especially interesting in that Senator Pell, being from Rhode Island, has in general supported the extension of U.S. fishing jurisdiction out to 200 miles.

Our Ambassador to the Caracas Conference, John Stevenson, also supports the supposition of the importance of unimpeded passage:

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[1]"Senator Pell Spurns New Sea Law," *San Diego Union*, 6 August 1974, p. A-6.

> The No. 1 priority is the mobility of our naval and air forces and the importance of retaining our nuclear deterrence.[1]

Referring to the international straits he stated:

> It is important to have a regime of unimpeded transit through these straits.[2]

Finally, in his address to the joint session of Congress upon becoming President of the United States, Mr. Ford stated:

> . . . we cannot rely on the forbearance of others to protect this nation. The power and diversity of the armed forces, the resolve of our fellow citizens, the flexibility in our command to navigate international waters that remain troubled--all are essential to our security.[3]

President Ford may have been speaking in metaphorical terms but the relationship in his mind between "international waters" and "security" is significant.

In summary, U.S. national policy for the law of the sea is based upon international acceptance of the doctrine of umimpeded passage through and over international straits. Such passage is viewed by the leaders of the nation as vital to the national security of the United States.

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[1]"Envoy Relates U.S. Sea Law Objective," *San Diego Union*, 8 August 1974, p. A-10.

[2]Ibid.

[3]"Text of President Ford's Congress Speech," *San Diego Union*, 13 August 1974, p. A-4.

Opposing Views

The policy of the United States for the Third Law of the Sea Conference has been attacked both within the United States and from abroad. Nationally these attacks are usually from industries that are not satisfied that their specific interests are being protected by the government from foreign encroachment. In some cases, such as the fisheries industries, it is a fear that one segment of the industry will benefit more from the policy than another.

The key question to be solved by the international community is the limit of national sovereignty at sea. The policy of the United States is to accept a 12-mile limit based upon unimpeded or free transit[1] through international straits. It has been a basic policy of the United States since 1970.

This element of national policy has been criticized in a staff report prepared for the Senate Committee on Interior and Insular Affairs, which stated the following in regard to free transit through the international straits:

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[1]Free transit and unimpeded passage mean the same. The latter term was adopted by the State Department in the early part of 1974 because it was felt to be less offensive to coastal states. (Lynch interview.)

> All transiting vessels and aircraft, including military vessels and aircraft, would be free from any action by the coastal nation to prevent transits which it considers to be not innocent. In essence, military vessels and aircraft transiting international straits would be enjoying freedom from law or legal regulations--a status not enjoyed by any navigator since the days of the pirates. . . .[1]

Further:

> . . . we believe that the U.S. free transit proposal may be unattainable and . . . we fear that the Department of Defense might urge the administration to abandon its deep sea mining objectives and support the creation of an international seabed mining monopoly controlled by less developed nations as a trade-off for votes of such less developed nations in favor of the Defense Department-sponsored free transit proposal.
>
> To sacrifice U.S. mineral interests in mining the deep seabed for a perceived military objective is at least debatable; but to sacrifice U.S. mineral objectives in mining the deep seabed for what may be an *unattainable* military objective is folly, we feel.[2]

In addition to this stricture, some publicists in foreign affairs have decried it.[3] The objections put forward are that, (1) the position represents a protection of Department of Defense interests cloaked in a

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[1]U.S., Congress, Senate, Committee on Interior and Insular Affairs, *The Law of the Sea Crisis: A Staff Report on the United Nations Seabed Committee, the Outer Continental Shelf, and Marine Mineral Development*, 92nd Cong., 1st sess., Committee Print, 2 pts., 1971-1972, pt. 1, pp. 9-10.

[2]Ibid.

[3]Brown and Fabian, p. 307.

veil of national security, (2) that making the position "non-negotiable" may force a trade-off on other more important interests, and (3) insistence on unimpeded transit through international straits may cause a failure to attain any international agreement.

More specific objections were made in a statement by H. Gary Knight, Professor of Marine Resources Law, Louisiana State University, before the House of Representatives' Subcommittee on International Organizations and Movements. He made assumptions concerning U.S. naval strategy, then pointed out the weaknesses in such a strategy.

Professor Knight saw the interests of the Department of Defense as:

> . . . (1) naval mobility, which can be subdivided between the needs of the nuclear armed Polaris fleet and more traditional naval operations, and (2) the right to implant anti-submarine warfare ("ASW") tracking and detection devices on the seabed.[1]

He then made the assumption that:

> . . . both non-detection and non-destruction of nuclear armed Polaris class submarines are the key elements in the preservation of our second strike nuclear capability which is, in turn, the linchpin of the current deterrent to nuclear conflict. I am also assuming that detection is a *sine qua non* to

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[1] U.S., Congress, House, Committee on Foreign Affairs, *Law of the Sea*, p. 73.

> destruction. Finally, I assume that our strategy is based essentially on confrontation with the Soviet Union.[1]

Proceeding from that point, Professor Knight argued that it is unnecessary to guarantee submerged transit for nuclear submarines through international straits. First, if the Soviet Union did possess ASW detection devices in international straits, then submerged transit would not prevent detection. If they did not possess them, then they would have them in place before any unimpeded transit could be internationally guaranteed. Secondly, the advent of the Underwater Launching Missile System (ULMS), with its increased range, would make passage through international straits unnecessary. Third, detection of a submarine does not necessariy mean that a second strike capability will be impaired. Finally, the USSR supports unimpeded passage through international straits. Anything that would be supported by them might put us at a disadvantage.[2]

Internationally, the position of the United States regarding unimpeded passage through international straits is opposed by some developing countries as well

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[1]Ibid., p. 74 (n. 3).

[2]Ibid., pp. 74-75.

as a few established nations who have been formerly close friends of American policy.[1] These countries could be further divided into two groups, the Archipelago States and the Strait States. Among the former, one finds such countries as Indonesia, Phillipines, and Greece. Among the latter are Spain, Morocco, Malaysia, Yemen, and Cyprus.

Although the two groups differ conceptually, in practice they are united in objecting to foreign ships transiting their waters without expressed permission. The Strait States base their argument on territorial sea claims while the Archipelago States argue that their waters are internal.[2] The Strait and Archipelago States submitted joint draft articles on navigation through the territorial seas including straits

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[1]According to Capt. Lynch, Spain has been the most outspoken critic. (Lynch interview.)

[2]The archipelago concept was introduced by Indonesia in December of 1957. Indonesia argued that its 13,000 islands presented such a complex problem in determining its territorial seas that, instead of establishing a baseline around each island, the baseline would be established around the archipelago as a whole and that all waters within were internal and subject to national jurisdiction. This resulted in a parrallelogram 3,000 miles in length which expanded the sovereign claim of Indonesia from roughly 700,000 square miles to cover 3,500,000 square miles. The area of Indonesia was increased from approximately the size of the States of Alaska and Arizona to greater than the entire land area of the U.S.

used for international navigation to the United Nations Sea-Bed Committee in March of 1973.[1] This draft represented the opposing views to the United States policy on territorial seas and unimpeded passage through international straits by foreign critics. There were five major characteristics to their proposals: (1) unitarian treatment, (2) balance of interests through the concept of "innocent passage," (3) regulation of passage, (4) special treatment for ships with special characteristics, and (5) control of foreign warships.[2]

The policy of the Strait and Archipelago States is based upon unitarian treatment. Whereas the United States believes that international straits, because of the function they serve in international navigation, deserve special treatment, these States believe they do not. If the strait falls within the territorial waters or internal waters of a state, the rules applicable to these waters apply. Emphasis is placed on the guaranteed right of innocent passage protecting foreign commerce.

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[1]United Nations Document A/AC. 138/SC.II/L.18 of 27 March 1973 in U.N. General Assembly, 28th sess., *Report of the Committee on the Peaceful Uses of the Sea-Bed and Ocean Floor Beyond the Limits of National Jurisdiction*, Supplement No. 21 (A/9021), vol. 5.

[2]de Yturriaga, p. 87.

The opposing states believe that innocent passage achieves a balance between the interests of the coastal state and the interests of international maritime navigation. They argue that:

> The notion of "free transit" through straits which form part of the territorial sea is unknown to state practice and cannot offer an adequate solution to the problem, because it would alter the existing balance of interests between coastal and noncoastal states, and derogate the sovereignty of the former over the territorial seas. Such an aftermath can hardly be admitted within an organization which is based on the principle of sovereign equality of all its members (art. 2, para. 1 of the U.N. Charter).[1]

Innocent passage is believed to be the best way that the coastal state can exercise sovereign rights over its territory and provide for its national security.

The draft would expand the right of coastal states to assure that ships exercising the right of innocent passage comply with laws and regulations enacted by the coastal state. Specifically, it would expand the scope of these rights to include the establishment of sea lanes, the prevention of pollution, and the regulation of scientific research.

In addition to the above regulation of passage, the coastal state would have the right to regulate the passage of ships with special characteristics. These

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[1]Ibid.

ships fall into three categories: type of propulsion, nature of cargo, and activity of ship. These vessels require special rules whereby the coastal state may protect its security.

The 1958 Conference on the Law of the Sea was not specific enough in regulating the passage of warships through territorial waters and international straits. The Strait and Archipelago States' draft would require that such passage be conditional upon prior notification to or authorization by the coastal state.

Expressed in terms of ocean theory, the United States' policy for the use of the oceans of the world is a combination of functional nationalism and functional internationalism. The proposal submitted by the Strait and Archipelago States, with its stress on a nation's sovereign rights, is best described as normative nationalism.[1]

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[1]There are four theoretical schools for the allocation of ocean resources. Normative Nationalists believe the resources of the ocean are their sovereign right. Functional Nationalists claim that the nation-state is the most useful institution for making decisions regarding the use of the oceans through special purpose zones. Functional Internationalists see some issues beyond the capacity of the nation-state to solve alone and that international cooperation in specific areas is required. Normative Internationalists desire

Summary

The United States recognizes that in order for a meaningful regime to emerge from the international community for the exploitation of ocean resources, needed for the rising world population, an agreement must be reached regarding the extent of a nation's sovereignty over the sea. To this end a national policy has been formed which would abandon a traditional stance of recognizing only a 3-mile limit to territorial seas for one that would incorporate a 12-mile limit. This would be conditional upon the recognized right of unimpeded passage instead of innocent passage through international straits. These straits have historically acted as a catalyst for conflict between nations. Such a position is typical of the functional approach which the United States prefers in law of the sea matters for only in this manner can it hope to satisfy all its various domestic interests.

This policy has raised some political issues within the United States. Domestically the policy has been attacked as favoring Department of Defense

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a new world order to replace the nation-state. R. L. Friedheim, *Understanding the Debate on Ocean Resources* (Denver: University of Denver, 1968-69), pp. 1-10 inter alia.

interests over other interests. It is felt that national security does not require unimpeded passage through international straits, particularly for warships and planes. Furthermore, by maintaining a strong stance on this issue, more important interests would be negotiated away. This is particularly true of deep seabed mining, and, by inference, petroleum resources.

In examining the process used for reaching the U.S. policy for the Third Law of the Sea Conference, it must be concluded that all political interests had an opportunity for being represented. If anything, petroleum interests could even have been favored. One of the key figures in the formation of national policy, John Stevenson, was formerly with the law firm of Sullivan and Cromwell, who represent Standard Oil of New Jersey.[1] In spite of this, there seems to have been equal treatment afforded to all interests by the civilian leadership.

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[1]According to Capt. Lynch (Lynch interview), Stevenson was frequently attacked by oil representatives during the policy meetings for not supporting his own interests (oil). Additionally, it should be noted that the then Secretary of the Navy, John Warner, had married into the Mellon family who has extensive holdings in Gulf Oil. Warner was deeply involved in the formation of policy for the law of the sea on the Department of Defense level.

On the international level, U.S. policy for unimpeded passage has been opposed by a group of states which are either archipelago countries or which have coastlines on international straits. Their argument is given in legal terms, stating that free transit "is unknown to state practice." In reality their argument is a political one. They fear that unimpeded passage may change the "balance of interests" between coastal and maritime states, thus affecting the national security of the former.

CHAPTER II

THE DOMESTIC REBUTTAL

> All was ruled by that harsh and despotic factor, shipping.[1]

Domestic critics argue that the right of unimpeded passage through international straits is not necessary for the national security of the United States. They have given what appears to be reasonable objections to the adopted policy. It remains to investigate in more detail how the national security of the U.S. is involved in this issue. In so doing, it may be possible to sustain or reject criticism of the policy.

All the objections to unimpeded passage raised within the United States have one feature in common. They separate military considerations from non-military. By so doing, they are able to attack what might be the weaker of the two positions. It is *somewhat* easier to provide quantitative data to show shipping's role in the U.S. economy, than to quantify an abstract such as nuclear deterrence. Any discussion

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[1]Winston L. Churchill, *The Grand Alliance* (Boston: Houghton Mifflin, 1950), cited by Robert D. Heinl, Jr., *Dictionary of Military and Naval Quotations* (Annapolis: Naval Institute Press, 1966), p. 294.

of the importance of unimpeded passage through international straits for the U.S. must address both military and non-military considerations in order to be complete. Any maritime strategy developed for the nation's security is a combination of the two. ". . . naval strategy is not a thing by itself. . . . its problems can seldom or never be solved on naval considerations alone. . . ."[1]

Military Considerations

If one took the statements of political leaders and government officials of the United States at face value it would appear that, *in their view*, the national security of the U.S. is best achieved through "peace" based on military strength.[2] If military strength

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[1]Julian S. Corbett, *Some Principles of Maritime Strategy* (Annapolis: Naval Institute Press, 1972), p. 9.

[2]How much reliance can be placed upon the public statements of political actors is not agreed upon by social scientists. The degree of reliance is often associated with the methodology employed. A behavioralist would place a great deal less emphasis in what political actors say and more emphasis on their actions. Another position is that advanced by Harré and Secord. They believe that we must listen to what is being said. "Traditional arguments against taking self reports seriously overlook the fact that at least some statements are not a *sign* of a state of mind, but themselves constitute that state of mind (e.g., to complain is to be discontented). It is through reports of

plays a central role in U.S. national security, how is this strength weakened by a rejection of unimpeded passage through international straits? In order to answer this, one must inquire what present military thought is--especially maritime strategy.

U.S. military strategy as seen by the Department of Defense was outlined by former Secretary of Defense, Elliot Richardson, who as we have seen had a key part in the formation of ocean policy for the U.S. In a statement before the House Armed Services

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feelings, plans, intentions, beliefs, reasons, and so on that the meanings of social behaviour and the rules underlying social acts can be discovered." H. Harré and P. F. Secord, *The Explanation of Social Behaviour* (Totowa, N.H.: Littlefield, Adems & Co., 1973), p. 7.

If this hypothesis is correct, then we might be misjudging the importance of statements by political leaders in dismissing them entirely. To apply this to the case in point, we have the following statements by government officials. Former President Nixon: "When we speak of priorities, the first priority must always be peace for America and the world." President Ford speaking before Congress: "Successful foreign policy is an extension of the hopes of the whole American people for a world of peace and orderly freedom. . . . A strong defense is the surest way to peace. Strength makes detente attainable. Weakness invites War. . . ." Finally, U. Alexis Johnson, Under Secretary of State for Political Affairs: "In a world as it is--and is likely to be for the indefinite future--military strength and diplomacy are the fingers of the same hand. A national commitment to the search for peace, not backed up by military strength, would not be a policy at all. It would be a pious expression of hope, devoid either of credibility or effect."

Committee on April 10, 1973, Richardson declared that the first military objective in support of our security interests was: "Together with our allies, deter warfare at all levels of conflict and maintain the capability to defend our interests should deterrence fail."[1]

This strategy was further refined at the Department of the Navy level. Admiral Turner, former President of the Naval War College, has given the most recent insight into present naval strategic thought in support of Defense Department policy. In order to support the national security objectives, the navy considers that it has four missions, (1) strategic deterrence, (2) sea control, (3) projection of power ashore, and (4) naval presence.[2] These missions have

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[1]U.S., Congress, House, Armed Services Committee, *Annual Defense Department Report, FY 74*, by Elliot Richardson (Washington, D.C.: Government Printing Office, 1973), p. 26.

[2]Stansfield Turner, "Missions of the Navy," *Naval War College Review* 26 (March-April 1974): 2-18. According to Turner, "strategic deterrence" can be subdivided into (1) having an assured second strike capability, (2) being able to control a response in case of a partial nuclear attack, (3) being able to deter third powers from attack, and (4) presentation of a "balance of power image" to other countries.

"Sea control" is a deliberate alteration of the traditional naval mission of "control of the seas." Turner believes that it is no longer conceivable for any one power to dominate the ocean. Control can only be exercised on, over, or under the ocean in limited

one thing in common, the need for maximum mobility under, on, and above the sea. Professor Knight appears to have correctly identified the nucleus of Defense Department interests in the law of the sea policy for the U.S. He had divided these interests between the "nuclear armed Polaris fleet" (strategic deterrence mission) and "more traditional naval operations" (sea control, projection of power ashore, and naval presence). However, he directed his argument against only one of the four missions, that of strategic deterrence.

Professor Knight indicated that it is unnecessary to have submerged transit of international straits because it would not avoid detection of our nuclear submarines. This appears to be placing unwarranted faith in both the U.S. and the Soviet anti-submarine (ASW) capabilities. It is a general opinion in naval circles that, in spite of the efforts expended in other

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areas for limited times.

While "sea control" concerns itself with what happens militarily in the ocean medium, "projection of power ashore" is concerned with the impact of naval forces on land forces. This impact can be in the form of amphibious assault, naval bombardment, and tactical air strikes.

"Naval presence" is the use of naval forces, short of war, to achieve political objectives. These could be broadly stated as deterring or encouraging actions which are either detrimental or in the interest of the U.S.

areas, the best way to hunt a submerged submarine is by use of another submarine.[1]

Equally important as the right to place seabed sensors in the straits, as suggested by Knight, is the right to proceed without prior notification or authorization through an international strait. If notification of transit was required under international law, it *could* affect nuclear deterrence. First, it could involve the strait state in the present great power nuclear stalemate, thus expanding the scope and complexity of the deterrent problem. Second, and related to the first, the strait state could be put under pressure by the nuclear powers to pass transit information to them, easing the problem of interception by attack submarines. This in turn could enhance a first strike capability. Third, and most important, the ability to affect deterrence would give the strait state *political power* warranted by only its geographic position.

Two elements overlooked in the need for submerged transit are the simple ones of cost and safety. Even the United States could ill afford to lose a $781

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[1]Sherman E. Wright, Jr., "ASW and the Modern Submarine," *U.S. Naval Institute Proceedings* 99 (April 1973): 62-71.

million submarine.[1] This sum is greater than the gross national product (GNP) of 36 non-communist countries, among them the Strait States of Yeman and Cyprus.

A nuclear submarine has been designed as a true submersible. For this reason it operates most efficiently and safely in the submerged condition.[2] When on the surface it handles poorly, especially in rough weather. Additionally, its low profile and dark color make it extremely difficult to see and to judge its maneuvers. The submarine's conning officer is likewise hampered. His ability to see surface ships may be limited because of his low height of eye.[3] The chances for collision in the busy international straits is thus increased by requiring these submarines to transit on the surface instead of submerged.

It has been argued that unimpeded passage through international straits will not be required with the introduction of the Underwater Launching Missile

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[1]U.S., Congress, House, Armed Services Committee, *Annual Defense Department Report*, p. 57.

[2]R. S. Crenshaw, Jr., *Naval Shiphandling* (Annapolis: U.S. Naval Institute Press, 1963), pp. 247-248.

[3]The distance to the horizon is approximately 5.7 n.m. for a Polaris boat as compared to 8.9 n.m. for the new fleet oilers.

System (ULMS). The ULMS would have over a 4,000 mile range making transit of international straits unnecessary in order to provide nuclear deterrence. Theoretically, this would almost be a valid argument with the 2,880 mile Polaris missile.[1] By stationing Polaris submarines around the Asian land mass, but outside of international straits, it would be possible to reach every area of the USSR with the exception of the Sayanski mountain region of southern Siberia. But drawing arcs on a map belies reality, it does not take into account ice caps, depth of water, location of vital industries, or the location of population.

Deterrence, like beauty, is in the eye of the beholder. The U.S. deterrence is based on the capability of "assured destruction" by a second strike. Former Secretary of Defense McNamara has defined this as the capability of inflicting upon the USSR the destruction of 50 percent of its industry and 20-25 percent of its population.[2] In order to inflict the necessary population casualties the Soviets would have

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[1]The International Institute for Strategic Studies, *The Military Balance 1973-1974* (London: International Institute for Strategic Studies, 1973), p. 69.

[2]Robert McNamara, *The Essence of Security* (New York: Harper & Rowe, 1968), p. 76.

to destroy 48 American cities while the United States would be faced with the task of hitting 88 of theirs. Thus America faces a more complex targeting problem.

Aside from the targeting problem, the United States is presently inferior to the Soviet Union in numbers of Submarine Launched Ballistic Missiles (SLBMs) available. The SLBM submarine is the least vulnerable of the U.S. missile forces and comprises 44 nuclear submarines carrying 710 missiles.[1] Under standard operating conditions half of the U.S. Navy's SLBMs are in a ready posture. This would equate to 355 missiles available to strike 88 cities, roughly a 4 to 1 ratio.

The Soviet Union has the capability of launching 950 missiles by its 62 strategic submarines.[2] Using the same approach as we did with the U.S. forces, the Soviets would be able to launch 475 missiles at the required 48 U.S. cities. They would have about a 10 to 1 ratio.

ULMS in combination with the Multiple Independently-targetable Re-entry Vehicle (MIRV) would help the United States off-set this superiority. The

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[1]"Zumwalt Says Russia Gaining on U.S. Fleet," *San Diego Union*, 29 April 1974, p. A-11.

[2]Ibid.

same number of submarines with the increased range that ULMS affords would give the U.S. a more flexible coverage along with greater density of coverage. Cities originally targeted for Inter-continental Ballistic Missiles (ICBMs) could be retargeted to the more assured threat of the SLBM. These advantages might be canceled if the increased range advantage were to be used up by keeping forces outside the international straits.

Another important advantage accrues by utilizing the entire expanse of ocean offered by the introduction of ULMS. The ASW capability of the attack submarine has already been mentioned. A good portion of the Fleet Ballistic Missile Submarine's concern in the future will be to rid itself of these unwelcomed escorts. The more ocean available for maneuvering and hiding, while still remaining within range of its designated targets, the greater the opportunity to retain a viable deterrent.

While much has been said regarding the nuclear deterrent mission of the navy by Professor Knight, he says little about the need for naval mobility in the more traditional forms of naval operations. It is believed that these traditional missions of the navy

are becoming more rather than less important. In April of this year Defense Secretary Schlesinger told two Senate Foreign Relations Subcommittees on Security and Arms Control that he believes conventional forces are now more than ever required because of nuclear parity.[1] Former Chief of Naval Operations, Admiral Zumwalt, has been even more definite in his views:

> Both navies, U.S. and U.S.S.R., are designed in part for nuclear deterrence. To that extent, our tasks are similar. Beyond that point, however, U.S. Naval forces are designed to support distant U.S. forces overseas, and under the Nixon Doctrine, when required, the indigenous armies of our allies, necessitating forward defense, sea control, and the ability to project our power ashore. . . . We have, in addition, a logistic defense requirement of vast proportions.[2]

It is in the traditional naval operations that the need for unimpeded passage through straits becomes more obvious. It may well be argued that a 4,000 mile missile may hit moscow from the mid-Atlantic, thus providing deterrence. But a naval task force which is

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[1]"Non-Nuclear Arms Stressed," *San Diego Union*, 5 April 1974, p. A-8. The question should be raised: if parity has been achieved, why the need for ULMS? The point here is that with or without parity, the need for unimpeded passage remains. With ULMS it is needed to bring more targets within range of the SLBM while allowing evasion. If ULMS is not needed because of parity, then traditional missions require the passage.

[2]Cited by John Collins, *Grand Strategy* (Annapolis: Naval Institute Press, 1972), p. 69.

denied passage through the Straits of Hormuz, would be of little use as a support to some Persian Gulf country which would continue close ties with the United States. As U. Alexis Johnson has pointed out, ". . . military strength and diplomacy are fingers of the same hand."[1]

Another example can be offered to show the importance of unimpeded passage for the traditional naval missions of sea control, projection of power ashore, and naval presence. During the Indo-Pakistan War of December, 1971 the United States sent Task Force 74 comprising of the U.S.S. Enterprise (CVAN 65), the helicopter carrier Tripoli (LPH 10) with 800 marines aboard, and seven destroyer class ships on a naval presence mission. The ships utilized the Straits of Malacca in reaching their destination. If they had been denied passage through the Straits and the archipelago concept was in force, two states (Malaysia and Indonesia) could have aborted the mission by acting in concert. The distance from Subic Bay in the Philippines to India is roughly 3,000 miles via the Straits of Malacca. Ships denied passage through the Strait and the waters surrounding the Indonesian islands would have to circumnavigate the eastern side of New Guinea.

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[1]See p. 39 (n. 2).

This would increase the transit to 8,000 miles requiring 21 days instead of 9 days to complete. Nor would it have been possible to send ships from the 6th Fleet in the Mediterranean of the East Coast of the U.S. to arrive any earlier. The war itself lasted only 14 days.

The report to the Jackson Committee opposed unimpeded passage on the basis that granting such right to military craft would allow them to enjoy "freedom from law of legal regulations--a status not enjoyed . . . since the days of the pirates. . . ."[1] This is an overstatement of the facts as will be pointed out in more detail in the following chapter. What is important at this time is the related opinion that, the adoption of a policy which supports unimpeded passage for warships by the U.S. would lead to failure for international agreement. Professor Knight noted that the USSR supports unimpeded passage. A reading of the draft articles submitted by the United States[2] and the

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[1]See p. 28.

[2]United Nations, General Assembly, Committee on the Peaceful Uses of the Sea Bed and the Ocean Floor Beyond the Limits of National Jurisdiction, Subcommittee II, 28th sess., *Draft Articles on the Breadth of the Territorial Sea, Straits, and Fisheries Submitted by the United States* (A/AC 138/SC II/L.4), 30 July 1971.

Soviet Union[1] for the Caracas Conference reveals that the wording of the two documents are so similar as to indicate close cooperation by the two countries in their formation. From this it would appear that the agreement by the two superpowers regarding unimpeded passage of all ships, including warships, would enhance rather than negate the possibility for world-wide agreement.

Agreement for unimpeded passage through international straits for warships is not a simple matter of developing countries opposing developed countries. The "Specialized Conference of Caribbean Countries Concerning Problems of the Sea" resulted in the issuance of the "Santo Domingo Declaration" of June, 1972 which ten developing nations were signatories.[2] The document offered a compromise solution for the many problems associated with the law of the sea--primarily through the concept of a "patrimonial sea." Nothing in this concept would prevent maritime nations from exercising

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[1]United Nations, General Assembly, Committee on the Peaceful Uses of the Sea Bed and the Ocean Floor Beyond the Limits of National Jurisdiction, Subcomittee II, 28th sess., *Union of Soviet Socialist Republics: Draft Articles on Straits Used for International Navigation* (A/AC 138/SC II/1.7), 25 July 1972.

[2]These were Colombia, Costa Rica, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Dominican Republic, Trinidad and Tobago, and Venezuela.

"free passage" as compared to "innocent passage" through international straits.[1] Nor is it likely that some developing countries such as Iran would like to see Strait of Hormuz come under the control of a hostile country, as witnessed by its claims to two strategically located strait islands (Abu Musa and the Thums) in 1971.

The actual fear of the Jackson Report appears to be that mineral interests will be subordinated to military considerations.[2] How important are these non-military considerations?

Non-Military Considerations

Three percent of the world's Gross National Product (GNP) is derived from ocean activities. This equates to approximately $62.5 billion. Of this amount, living resources contributed $8 billion while non-living resources account for $6 billion. Shipping

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[1]Charles L. Cochran, "An Inter-American Approach to the Law of the Sea?", *Naval War College Review* 26 (March-April 1974): 64.

[2]". . . to sacrifice U.S. mineral objectives in mining the deep seabed for what may be an *unattainable* military objective is folly, . . ." (see p. 28).

has been estimated to add $40-50 billion to the world GNP.[1]

The share of the total $62.5 billion GNP that the United States contributes is estimated at between $15-25 billion.[2] If we take the average, the United States accounts for one-third of the world's GNP associated with ocean activities.

A breakdown of the United States' GNP contributed by shipping, living, and non-living resources is not available. It has, however, been estimated that the United States owns or controls, through individuals or corporations, one-third of the world's shipping.[3] Taking the low figure of $40 billion as shipping's contribution to world GNP, the share of U.S. shipping could be estimated to be $13.3 billion. Even if the United States contributed the entire amount of the $8 billion and $6 billion for living and non-living resources, shipping would still play the dominant role in the economics involved. In terms of percentage of United States GNP generated by shipping (civil plus military) rough estimates could be made placing it from

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[1] Hodgson and McIntyre, pp. 1-2. [2] Ibid.

[3] Samuel A. Lawrence, *United States Merchant Shipping Policies and Politics* (Washington, D.C.: The Brookings Institution, 1966), p. 105.

2 to 6 percent of total GNP. While this is small, it still is better than the combined percentage of a little over 1 percent for living and non-living resources.[1]

Shipping is likely to remain the leading ocean industry for the United States in the foreseeable future. It has already been pointed out that, even with offshore oil, the U.S. will be dependent upon shipping to carry half of its petroleum requirements by 1985.[2] Offshore mining of minerals could reduce the

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[1]U.S., Department of Commerce, Bureau of the Census, *Statistical Abstract of the United States, 1972*, p. 314 inter alia. The method of using GNP as a social indicator is not completely satisfying. Heilbroner has described four problems associated with it: (1) GNP deals in dollar values, not in physical units, (2) GNP does not reflect the quality of output, (3) GNP does not reflect the purpose of production, and (4) GNP does not include most goods and services that are not for sale. (Robert Heilbroner, *The Economic Problem* [Englewood Cliffs, N.J.: Prentice-Hall, 1972], pp. 181-183.)

While non-living resources might contribute a maximum of only $6 billion in terms of immediate GNP, its contribution as perhaps an energy source necessary for further production and further generation of GNP is overlooked. On the other hand, something with little utility, such as a pleasure boat, would be given the same importance as a more utilitarian product and be reflected as shipbuilding. Perhaps all that can be said is that it gives us a poor but universally recognized indicator of the relative importance of the ocean activities.

[2]See p. 18.

imports of such metals as nickel, manganese, colbalt, and copper. The mining, however, must still take place in the deep sea regions of the ocean. This means that the minerals would require ships to carry them to the United States.[1]

The U.S. is also dependent upon ships for the import of living resources of the sea and, without a major change in fishing techniques, is likely to remain so. The United States must import $844 million worth of industrial fish each year. This represents half U.S. requirements.[2]

Shipping has a certain strategic value to the United States. This is most obvious in the case of petroleum supplies but not limited to them. The United States exports two-thirds of the world's coal and one-half of its grain.[3] According to Department of the

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[1]Jack N. Barkenbus, "International Implications of Manganese Nodule Mining," paper prepared for the Western Peace Science Association Meetings, San Diego, Ca., 21-22 February 1974, p. 309. Barkenbus estimates the reduction of imports at 53 percent for nickel, 12 percent for manganese, and 41 for copper. Colbolt imports would be eliminated.

[2]John A. Knauss, "Factors Influencing a U.S. Position in a Future Law of the Sea Conference," Occasional Paper No. 10 for the Law of the Sea Institute, University of Rhode Island, Kingston, R.I., 1971, p. 8.

[3]Baldwin, p. 289.

Interior, the U.S. imports more than 50 percent of the 7 of the 13 raw materials considered essential to industrial health. The Defense Department puts the needs much higher. According to the Pentagon, 69 of the 71 materials considered necessary for defense must be shipped into the United States.[1]

Shipping will continue to wax in both size and importance as increased pressures are placed upon the resources of the sea. The world fleet has already grown from 100 million Gross Registered Tonnage (GRT) in 1959 to 230 million GRT in 1971.[2] This year it is in excess of 250 million GRT. This represents an annual growth rate of 6 to 8 percent.

U.S. shipping requirements for an international regime for the sea coincide and support military requirements. Shipping's advantage over other forms of transportation is its ability to carry great bulk at economical rates. It is most economical when a direct route can be utilized. The shortest shipping routes

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[1]Dean C. Miller, "Raw Material Cartels Feared," *San Diego Union*, 26 February 1974, p. A-9. Also see U.S., Department of the Navy, Office of the Chief of Naval Operations, *U.S. Life Lines* (Washington, D.C.: Government Printing Office, 1966).

[2]U.S., Department of the Interior, *Minerals Yearbook, 1971*, p. 13.

for world commerce use international straits. Any closure or delay through these routes can be expensive. It is because of the traditional importance of shipping, and its need for economical short route travel, that unimpeded passage is the primary element for U.S. policy for the non-military as well as military considerations. In time of peace and war, Strait and Archipelago States would be given a major political weapon if they could impede or stop shipping of a particular country upon their own subjective judgment.

An example will be helpful to illustrate the importance of unimpeded passage through international straits for U.S. shipping costs. The distance from Kuwait to New York by ship via the Strait of Gibraltar is 8,483 nautical miles (n.m.) as compared to 11,962 n.m. around Capetown, a difference of 3,479 n.m. A tanker sailing at its normal speed of 16 knots would require almost 10 additional days to sail the Capetown route. It costs an estimated $14,000 a day to run a tanker. The additional sailing time for one tanker would cost $140,000. On any one day 58 tankers enter and leave the Persian Gulf.[1] If one-third of these are owned or controlled by the U.S., then the cost to

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[1]Baldwin, p. 193.

shipping through the denial of passage through this one strait could amount to nearly $3 million per day or over $1 billion in the course of a year. It could increase the cost of a $12 barrel of oil to $18. The implications of such a rise in energy costs have been amply demonstrated within the last year.

Summary

Public statements by political leaders in the U.S. place emphasis on "peace" through "strength" for national security. Denial of the right to unimpeded passage "could," though not conclusively would, be detrimental for the mobility of naval forces and in this way weaken national security. In practical terms, surfaced vice submerged transit of nuclear submarines presents a danger to their safety. Also, unimpeded passage through straits increases the complexity of the ASW problem. In political terms, it seems unreasonable to involve additional states in the already complicated nuclear stalemate or to grant them the advantage of being able to control both military and commercial shipping. In economic terms, shipping does, and probably will in the future, play the major role in

ocean uses within the United States. Shipping requires the same unimpeded passage as military vessels.

In summation, domestic defense and shipping interests are best served by their present ability to move through the oceans--which is the status quo. Although they are now opposed by certain new domestic interests for the utilization of the sea, such opposition is likely to diminish as the need for shipborne imports and exports increases. In the long run, it would seem that unimpeded passage deserves the emphasis it has been given in domestic policy.

Failure to reach international political agreement for a law of the sea could increase tensions and thus weaken security. But would adherence to unimpeded passage cause such a failure? Although the U.S. and U.S.S.R. are in agreement as to its importance and not all developing countries oppose it, it cannot be said with certainty that success or failure would be inevitable. The issues are far more complex than that.

CHAPTER III

THE INTERNATIONAL REBUTTAL--
A LEGAL PERSPECTIVE

> Governments . . . are always anxious to shake off the restraining influence that international law might have upon their foreign policies, to use international law instead for the promotion of their national interests, and to evade legal obligations that might be harmful to them. They have used the imprecision of international law as a ready made tool for furthering their ends.[1]

In the previous chapter the problem of national security and the international straits was dealt with on the basis of how it is seen in the perspective of U.S. national policy as reflected in the domestic debate surrounding its position for the Third Law of the Sea Conference. Strong, even if not conclusive, domestic reasons exist for the United States to support unimpeded passage through international straits. It remains to inquire whether overriding reasons exist on the international level that would recommend abandoning this policy.

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[1]Hans J. Morgenthau, *Politics Among Nations* (New York: Alfred A. Knopf, 1973), pp. 276-277.

The position of foreign opponents to unimpeded passage has been discussed in Chapter I.[1] Of relevance to their argument is the opinion that "the notion of free transit through straits which form part of the territorial sea is unknown to state practice. . . ."[2] Granting of such passage would be a violation of a state's sovereign rights over its territory and could lead to a weakening of its national security.

One must look to international law for a test of the validity of these arguments. In doing so, the rights of warships to transit international straits will be emphasized on the assumption that these ships present the most obvious threat to the national security of the coastal state.

International Law Prior to World War II

The early publicists of international law, Grotius and Selden, were more concerned with the general rights of freedom of transit than with the straits themselves.[3] Pufendorf, writing in the

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[1]See p. 32.

[2]See p. 33.

[2]Hugo Grotius, *The Freedom of the Seas* (New York: Arno Press, 1972), and John Selden, *Of the Dominion, or Ownership of the Sea* (New York: Arno Press, 1972).

mid-seventeenth century, addressed the question of the right of coastal states to collect tolls from ships using the straits. While recognizing the right of all ships to use the straits, he concluded that a very moderate sum in tolls could justly be paid to the strait state to defer the cost of keeping the strait navigable. According to Pufendorf, a danger exists that the strait state may abuse the right of such tolls in which case the maritime states are equally justified in military action against the state.[1]

Vattel, writing in 1758, is the first to point out that there can be a functional separation of straits between those that serve as communication between two seas and used as a means of communication between many nations, and those that do not. Refusal of such passage through the former would be acting against the "Law of Nature."[2]

Hautefeuille, publishing in the mid-nineteenth century, disagreed with Pufendorf regarding the right

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[1]Samuel Pufendorf, *De Jure Naturae et Gentium Libri Octo*, trans. C. H. Oldfather and W. A. Oldfather (Oxford: Clarendon Press, 1934), pp. 360-361.

[2]E. de Vattel, *The Law of Nations or the Principles of Natural Law*, trans. Charles G. Fenwick (Washington, D.C.: Carnegie Institution of Washington, 1916), pp. 108-109.

to collect tolls, basing his objection on the argument that the right of passage is not an easement (because such a right did not exist in international law.) Further, Hautefeuille believed that the strait state did not have the right to search vessels in order to determine whether passage is innocent unless through special arrangements--"Le passage est libre sans aucune exception."[1] Hautefeuille not only recognized the functional separation of the straits as adopted by Vattel but further believed that the separation could be even more detailed. The right of passage could be entirely separated from the right of fishing and the right of jurisdiction.[2]

A British publicist, Holland, specifically addressed the question of the passage of warships through international straits. Noting that all previous (pre-1898) publicists on international law and international straits were motivated by national and personal considerations, he proceeded to put forward a position that also favored his government. He made a distinction between peacetime and wartime passage of

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[1]Translation: The passage is free without any exceptions.

[2]Brüel, p. 56.

ships. In peacetime the passage of ships, including warships, was innocent and therefore could not be impeded. In wartime, each nation could deal with the ships of the enemy as he desired.[1]

During the eighteenth and nineteenth century, as Holland noted, each publicist writing on the international straits upheld a position that usually favored his particular state. The liberal interpretations of the law were offset by narrow interpretations. Bruel notes that this situation changed during the early part of the twentieth century and that the general opinion of the publicists in the first thirty years of this century was toward an even more liberal construction of the right of passage. This was accounted for by the rise of internationalism.

> . . . the litterature [*sic*] is inclined on the whole, in the question of the extent of the territorial waters, to follow the usual rules, while with regard to the right of passage, it is disposed in time of peace to allow both merchant vessels and warships the right to pass through the territorial waters in straits of the kind here classified as international. In time of war, practically all agree that merchant vessels belonging to states not at war with the littoral state, have the right of passage, and some authors even allow the right of passage to warships belonging to belligerant powers, so that i.o.w. the neutral littoral state may not close international straits to the latter. . . .[2]

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[1]Ibid., p. 60. [2]Ibid., p. 69.

A resolution by the Institute of International Law, published in 1916, sustains the contention that a liberal interpretation of the law for straits passage was the norm by the twentieth century. "Straits which serve as passage from one open sea to another open sea can never be closed."[1]

Custom, as well as the writings of publicists, seems to support the right of unimpeded transit of international straits. In peacetime, this right extends to warships as well as merchantmen. The one exception, as will be noted, is that of the Turkish Strait.

The earliest example of the custom of states that is recorded concerns the Hellespont (Turkish Straits). In 220 B.C. the Byzantines tried to levy dues on Greek vessels sailing through the Straits. The Greeks appealed to Rhodes, which was the leading maritime nation of the time. The Rhodeans declared war on Byzantium and by their victory ended the extraction of maritime dues thus allowing free passage.[2]

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[1]James Brown Scott, ed., *Resolutions of the Institute of International Law* (New York: Oxford University Press, 1916), p. 115.

[2]Coleman Phillipson, *The International Law and Custom of Ancient Greece and Rome* (London: Macmillan & Co., Ltd., 1911), p. 380.

A similar example is found in the Far East. After the opening of Japan to foreign trade in the mid-nineteenth century, Japan continued to prohibit the transit of its straits, particularly the Shimonoseki Strait, to foreign ships. In 1868, England, France, the Netherlands, and the United States protested in a joint note that this closing was contrary to international law. When Japan refused to voluntarily open the Straits, the powers took joint action to force the Straits open for both merchant ships and warships.[1]

During the negotiations between Argentina and Chile for a treaty covering the Straits of Magellan in 1881, the United States declared that it would not tolerate excessive claims of any nation over these Straits. Further, the British and the French tried to get this principle confirmed by a collective treaty covering the Straits. It was the French opinion that if these Straits were closed to ships of war the principle of freedom of navigation would be violated.[2]

Up until 1913 the Danes viewed transit of the Danish Straits by warships in the same restrictive way

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[1]Brüel, p. 105; see also Samuel Eliot Morison, *"Old Bruin" Commodore Matthew Calbraith Perry* (Boston: Little, Brown & Co., 1967), p. 442.

[2]Brüel, p. 106.

as the Turks, that is to say, transit of the Danish Straits by warships was theoretically conditional upon the King's consent. In practice some warships, particularly German warships, steamed the Straits at will. On January 15, 1913 Denmark granted the right of foreign warships to transit the Straits. Not even notifications of such transits were required.[1]

Positive law also indicates that the sovereign rights of a state must be secondary to the welfare of the international community.

Article 16, section 3 of the Covenant of the League of Nations imposes on members the obligation not only to allow but to facilitate the passage of any armed force carrying out a punitive expedition. Such passage could be through both the state's territory and territorial waters. Thus, warships have the right to pass through international straits, even when they are formed by the territorial waters of a coastal state, when it is in the interest of world peace. Not only should such passage be unimpeded but the coastal state is obliged to assist in such passage!

Article 23e of the Covenant sustains national sovereignty being subordinate to the international

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[1]Ibid., p. 107.

good. On March 21, 1921 Germany had refused to allow an English vessel, the Wimbledon, to pass through the Kiel Canal. Germany was a neutral in the war between Russia and Poland. The Wimbledon was carrying ammunition to the Polish Military Commission at Danzig. Germany argued that allowing the ship to pass through the Canal would violate its neutrality. The Allied and Associated Powers (France, Italy, Japan, and Great Britain) opposed this position on the basis of Article 23e of the Covenant. This Article had its origin in the principle of unconditional freedom of navigation on the high seas contained in President Wilson's Fourteen Points. Article 23e called upon all members of the League to:

> . . . make provisions to secure and maintain freedom of communications and of transit and equitable treatment for the commerce of all Members of the League. . . .[1]

The Wimbledon Case was decided in the Permanent Court of International Justice on August 17, 1923. Its decision was based on the fact that the Canal had been declared neutralized by Article 380 of the Versailles Peace Treaty. The decision declared that the Kiel

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[1]League Covenant, cited by Inis L. Claude, Jr., *Swords into Plowshares* (New York: Random House, 1964), p. 462.

Canal shall be free and open to the warships and merchant vessels of all nations at peace with Germany.[1]

The Kiel Canal is not an international strait because it is man-made. It may be argued with considerable validity that the Court's ruling is not applicable to the straits issue. But, here is a strip of sovereign territory 335 feet wide, 37 feet deep, and 61 miles long, running through, and well within the borders of a sovereign state. Despite this, unimpeded passage has been granted under international law to a munitions ship of foreign registry. The claim of a sovereign right of neutrality was not enough to preserve the control of the Canal for the Germans, even though they constructed it within their own state. International law reflected the political reality that Germany was a defeated country.

As noted, the Turkish Straits had been a constant exception to the general trend of recognition for unimpeded passage for warships through international straits. Even this situation changed with the signing of the Lausanne Treaty on July 24, 1923 between the Allies and Turkey. The Allies had suffered great

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[1]Edward Hambro, *The Case Law of the International Court* (Leyden: A. W. Sijthoff's Publishing Co., 1958), pp. 117-119.

losses during World War I in trying to force open the Turkish Straits. President Wilson, in Point Twelve of his Fourteen Points, wanted internationalization of these Straits. Article 23 of the Lausanne Treaty stated that the contracting parties recognized and declare the principle of freedom of passage and navigation, *for both sea and air*, in time of peace and war through the Turkish Straits.[1] In all previous treaties pertaining to the Turkish Straits, Turkey had specifically denied unimpeded passage through the Straits for warships at any time. Now this was made conspicuous by its absence. It was also apparent that this freedom of passage was complete, requiring no previous notification of passage for either merchant ship or warship. That the provisions of the Lausanne Treaty applied to warships is supported by the fact that the Montreux Convention on the Straits, signed on July 26, 1936, later specifically rescended this right of passage for warships and required notification plus other restrictions.

Brüel has made the observation that the right of innocent passage of warships through Turkish Straits

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[1]Cleve Parry, ed., *A British Digest of International Law*, 8 vols. (London: Stevens and Sons, 1967), 2b:24-25; see also Brüel, p. 172.

was established in international law by the Lausanne Treaty. When the international political situation had deteriorated in 1936, Russia and Turkey felt that a new treaty was required to replace the liberal Lausanne one. This instituted the Montreux Convention which reestablished the Ottoman Rule whereby warship passage (including the submerged transit of submarines) was again restricted.[1]

The Hague Conference on the Codification of International Law was held in 1930. Its Committee on Territorial Waters, though unable to agree as to the breadth of the territorial seas, did make a definite statement regarding the right of unimpeded passage through international straits.

> Under no pretext whatever may the passage even of warships through straits used for international navigation between two parts of the high seas be interfered with.[2]

The Conference was significant in another respect. Andrassy points out that some publicists (Lapradelle and Faushille) up until this time still considered even the territorial sea as *res communis*, the Hague Conference was responsible for the beginning of the emphasis

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[1] Brüel, p. 98.

[2] G. H. Hackworth, *Digest of International Law* (New York: Garland Publishing, Inc., 1973), p. 611.

for "sovereignty" over this segment of water. Its Draft Convention on the Territorial Sea stated: "Sovereignty over this belt is exercised subject to the conditions prescribed by the present Convention and other rules of international law."[1]

International Law, World War II to Present

Just as at the end of the First World War, Internationalism seemed to be on the rise again following World War II. The right of warships to transit international straits became more clearly established in the writings of some publicists. Oppenheim believed that the right existed in both times of peace and war. In time of peace: "Foreign men-of-war must be admitted to such straits as form part of the highways for international traffic."[2] In time of war:

> . . . Has a belligerent a right to claim passage of its men-of-war? To this it seems, the author's answer would be: Yes, in case of such straits as form part of the highways for international traffic by connecting two open seas; and No, in the case of other straits.[3]

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[1]Juraj Andrassy, *International Law and the Resources of the Sea* (New York: Columbia University Press, 1970), p. 45.

[2]L. Oppenheim, *International Law*, 2 vols. (London: Longmans, Green & Co., 1955), 1:511-512.

[3]Ibid., 2:696.

Positive law supports this contention. Article 23e of the League Covenant was incorporated in Articles 43 and 104 of the United Nations Charter.[1] As noted when discussing the Wimbledon Case,[2] the sovereign rights of states over their territory can be modified if the interests of the international community dictate its necessity to insure world peace. Passage of warships through international straits is clearly allowed when it is *functioning* as an agent of the United Nations. Its passage could not be barred merely on the *character* of the ship alone.[3]

One of the first cases brought before the United Nation's International Court of Justice applied directly to the passage of warships through international straits. On October 22, 1946 two British warships struck mines while passing through the North Corfu strait (see Appendix C) on what might be

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[1]Article 43 obligates states to allow passage of UN forces through their territory. Article 104 gives UN agencies a legal status within the territory of a state.

[2]See pp. 68-69.

[3]This would seem to refute the claim of the Strait and Archipelago States that the character of the ship necessitates control over it.

considered as a mission of gunboat diplomacy or "naval presence."[1]

The British claimed that Albania had mined an international strait thereby impeding the passage of shipping. Albania denied any such knowledge of the mining and further stated that the strait was only of minor importance and therefore did not belong to the class of international straits. Further, the passage of the warships was not "innocent" because it was meant to be a show of force and therefore its sovereignty was violated. The Court ruled:

> It is, in the opinion of the Court, generally recognized and in accordance with international custom that States in time of peace have a right to send their warships through straits used for international navigation between two parts of the high seas without the previous authorization of a coastal State, provided that the passage is *innocent*. Unless otherwise prescribed in an international convention, there is no right for a coastal State to prohibit such passage through straits in time of peace.[2]

Further:

> . . . The Court has arrived at the conclusion that the United Kingdom did not violate the sovereignty

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[1]The ships were apparently sent to test the attitude of the Albanian Government regarding the right of warships to pass through the Straits. Earlier a ship had been fired upon while passing through the Strait.

[2]Green, p. 260.

of Albania by reason of the acts of the British Navy in Albanian waters on October 22, 1946.[1]

The practice of states since World War II regarding passage of ships through international straits can be illustrated by the events that surrounded the 1956 seizure of the Straits of Tiran by Israel.[2] The event dealt with the unimpeded passage of merchant ships through the straits but is important in that it, together with the judicial decision of the International Court of Justice in the Corfu Canal Case, formed the positive law that was to emerge from the First Law of the Sea Conference.

After the establishment of Israel as a State in May, 1948, hostilities ensued with its Arab neighbors. Egypt instigated visit and search procedures for ships passing through the Straits leading to the Israeli port of Elath. This was recognized as a right of a belligerent in time of war. However, Egypt continued these practices even after the Rhodes General Armistice Agreement signed on February 29, 1949. This interference with Israeli and other flag shipping passing through the Strait was continuously protested by Israel on the basis that it violated international law.

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[1]Ibid., p. 263. [2]See p. 12.

Egypt replied that, although an armistice had been signed, a state of belligerency still existed between the two states and that under international law it was legally entitled to such action.[1]

Egypt's actions continued until September of 1955. At that time Egypt began requiring any ship that desired to transit the Strait to obtain permission 72 hours in advance. This action brought protests from not only Israel, but from Britain and Jordan as well. Finally, on October 29, 1956, Israel launched its military offensive.

In the debates that followed the attack, Arab countries advanced the position that Israel had no legal right to a coast on the Gulf of Aqaba and that the Gulf was historically an Arab sea. On this basis the Strait of Tiran was not an international strait. The maritime powers of the world disagreed and took the side of Israel. The position of France was:

> The French government considers that the Gulf of Aqaba, by reason partly of its breadth and partly of the fact that its shores belong to four different States, constitutes international waters. Consequently it believes, that, in conformity with international law, freedom of navigation should be insured in the Gulf and the straits which give access to it. In these circumstances no nation has

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[1]Selak, p. 670-671.

> the right to prevent the *free* and innocent passage of ships whatever the nationality or *type*.[1]

The judicial decision of the International Court of Justice in the Corfu Canal Case and the practice of states in connection with the Gulf of Aqaba action was carried over into positive international law. This was reflected in the Convention on the Territorial Sea, written at the United Nations First Law of the Sea Conference in 1958.[2] Section III of that Convention concerns itself with the right of innocent passage, which we have seen has been interpreted most liberally by the International Court of Justice. Article 14, paragraph 4 states:

> Passage is innocent so long as it is not prejudicial to the peace, good order and security of the coastal State. Such Passage shall take place in conformity with these articles and with other rules of international law.[3]

Such passage appears to be granted to both merchant ships and warships of all states by Article 14, paragraph 1:

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[1]Ibid., p. 674. Italics mine.

[2]Leo Gross, "The Geneva Conference on the Law of the Sea and the right of innocent passage through the Gulf of Aqaba," *American Journal of International Law* 53 (July 1959): 564-594.

[3]United Nations, Legislative Series, *Legislation Relating to the Sea*, p. 724.

> Subject to the provisions of these articles, ships of all States, whether coastal or not, shall enjoy the right of innocent passage through the territorial sea.[1]

Article 16, paragraph 3 protects the security of the strait state by allowing it to suspend the right of innocent passage to foreign ships which pass through its *territorial waters*:

> Subject to the provisions of paragraph 4, the coastal state may, without discrimination amongst foreign ships, suspend temporarily in specified areas of its territorial sea the innocent passage of foreign ships if such a suspension is essential for the protection of its security. Such suspension shall take effect only after having been duly published.[2]

Such suspension must be honored by warships as stated in the only article directed specifically to warships, Article 23:

> If any warship does not comply with the regulations of the coastal State concerning passage through the territorial sea and disregards any request for compliance which is made of it, the coastal state may require the warship to leave the territorial sea.[3]

However, this right of suspension, whether applying to warships or merchant ships is not given to a state whose territorial waters are used for international navigation. Article 16, paragraph 4 states:

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[1]Ibid. [2]Ibid., p. 725.

[3]Ibid., p. 726

> There shall be no suspension of the right of innocent passage of foreign ships through straits that are used for international navigation between one part of the high seas and another part of the high seas or the territorial sea of a foreign State.[1]

Germane to the Archipelago States' argument is Section II, Article 5, paragraph 2. That the right of innocent passage through international waters that were formerly high seas exists for warships is supported by the specific reference to Article 23:

> Where the establishment of a strait baseline in accordance with article 4 has the effect of enclosing as internal waters areas which previously had been considered as part of the territorial sea or of the high seas, a right of innocent passage, as provided in articles 14 to 23, shall exist in those waters.[2]

The Shortcomings of the Law

There are four shortcomings to international law as it presently applies to international straits. First, it is indefinite as to when its provisions apply and to which type of ships. Secondly, it is silent as to the extent of the territorial sea, especially in the case of international straits. Third, it does not address the problem of air and submarine traffic.

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[1]Ibid., p. 725.

[2]Ibid., p. 722.

Fourth, it leaves the determination of innocence to the subjective judgment of the littoral state.

The only distinction in the present law regarding ship types is that between warships and merchant ships. Strait States argue that another class be added--"ships of special character."[1] These ships, as well as warships, could be denied passage through international straits under the provisions of Article 23 of the 1958 Geneva Convention.[2] Maritime states would argue that the character of the ship is not important but rather the intent is the criteria to be followed when determining the ship's passage presents a threat to the coastal state. They could support this position by citing the Corfu Canal Decision and Article 16 of the 1958 Convention.[3]

Second, the law must still come to grips with the problem of the extent of the territorial sea. It does little good to establish passage rights through the straits if the high seas at either end are eliminated by expanding unilateral claims. It also must face the problem of what to do with a strait that

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[1]See pp. 33-34. [2]See p. 78.

[3]See pp. 74 & 79.

formerly had a strip of high seas through it but now, through expanded claims to sovereignty, lies within a state's territorial waters. A solution may lie in the example provided for in Article 5, paragraph 2 of the 1958 convention.[1]

Third, a clear statement must be made in regard to the right of air and submerged transit through international straits. Is such transit to be guaranteed to both commercial and military craft? Article 23 of the Lausanne Treaty could be cited in support, while the Montreux Convention could be cited in opposition.[2]

Finally, "innocent passage" is a matter of subjective judgment on the part of the coastal state. This is a critical failing of the present law. When determination of the innocence is the perogative of the individual state, it is left to compete with the state's concept of "national security." When the "innocent" nature of such passage is decided in the negative, loss of life can occur. This was illustrated throughout history and most recently in the Corfu Canal and the Strait of Tiran.

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[1]See p. 79.

[2]See pp. 70-71.

The need for retaining the principle of "innocent passage" in the international law of straits has been argued by opponents of unimpeded passage. Only by so doing can the "existing balance of interests between coastal and non-coastal states . . ." be maintained.[1] What seems to be said here is that while the coastal state is willing to support international law it will not do so at the risk of losing possible political leverage and thereby its security.

A basic weakness of the present international law as it pertains to international straits is that its basis is political rather than legal. While this is necessary for agreement between sovereign states, it allows for a number of different interpretations of what the law says.

Summary

The *trend* in international law as it applies to international straits is for the interests of the international community, represented by an international organization, to take precedence over the national security interests of the state. The trend is not constant but rather coincides with the waxing and

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[1]See p. 33.

waning of Internationalism, which appears to be strongest after great international conflicts.[1]

It must be conceded that international law only reflects political reality. Liberal interpretations applied to the passage through international straits have been a reflection of the political supremacy of maritime states over landlocked or coastal states. Thus, while concluding that the trend in international law would support the United States' proposal for unimpeded passage, it is realized that the trend has its base in the past political supremacy of the maritime states.

In examining international law, it is quioxtic that opponents of unimpeded passage prefer the present doctrine of "innocent passage." The liberal interpretation of "innocent passage" given by the international Court of Justice would indicate that peacetime passage of any ship, unless it actually committed a belligerent act against the coastal state, is innocent. One conclusion is that the Strait States would prefer even

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[1]While the trend for the straits is for internationalization, that for other ocean interests can and do run at times in opposite directions. For example, the trend for territorial sea claims is for greater nationalization.

this small political advantage over the complete freedom of navigation guaranteed by unimpeded passage.

The real concern for international opponents of unimpeded passage is that it will give apparent legal sanction to political reality. In so doing it may indeed "alter the existing balance of interests between coastal and non-coastal states, . . ."[1] This alteration, however, would only be in form and not substance. It would be a recognition of the overwhelming power of the two nuclear superpowers, who are also maritime powers, over the coastal state.[2]

To argue, as the littoral states have, that recognition of such realities would be a weakening of their "sovereignty" over their territorial waters and thus their national security is questionable. First, it does not recognize that these territorial waters are, in some cases, unilateral extensions of sovereignty. Secondly, any claim to sovereignty over a territory must, under international law, be supported by control. Without maritime strength, control at sea

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[1]See p. 33.

[2]It is recognized that other states, including China, are nuclear capable. It is believed that the two strongest nations in the world, when viewed in terms of total resources, military, and industrial strength, remain that of the U.S. and U.S.S.R.

is impossible. Finally, in the present age of nuclear deterrence, the national security of all states is strongly dependent upon the relaxation of tensions between the United States and the Soviet Union through mutuality of interests. In the case of the international straits, unimpeded passage is in the interest of both countries.

The question was posed at the beginning of the Chapter whether there is any reason to abandon the policy for unimpeded passage when viewed in the context of international law. The answer appears to be, NO! Legally, the trend has been to support such passage. Politically, it recognizes the coincidence of interests of the two countries which could affect the security of all nations.

CHAPTER IV

SYNTHESIS

> Understanding requires theory; theory requires abstraction; and abstraction requires the simplification and ordering of reality.[1]

Any attempt to simplify the many complex and interrelated aspects of the law of the sea stands a distinct chance of failure from the start. The subject seems to defy disentanglement. This is especially true in regard to the straits issue and national security because it combines the ambiguity of international law with the subjectivity of which elements should be stressed when discussing national security. Still the attempt must be made.

The following approach suggests itself. First, the major areas of conflict will be indicated and the arguments summarized. An arbitrary division has been made between the domestic and international points of conflict. In reality the two are interrelated. Secondly, the arguments will be drawn together under a theoretical framework.

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[1]Samuel P. Huntington, *The Soldier and the State* (New York: Vintage Books, 1957), p. vii.

Domestic Points of Conflict

There are two areas of general discord over domestic policy for the international straits. First, should defense interests take primacy over the mineral industry interests (including petroluem interests) in the formation of national policy? Second, do naval missions require unimpeded passage through international straits?

Under the first area of general discord, minerals versus defense interests, the arguments may be summarized under three points of conflict.[1] First, does the adoption of unimpeded passage make naval forces free from law or legal restraints as argued by the mineral interests? Secondly, does the adoption of the policy of unimpeded passage advocated by defense condemn international agreement for the law of the sea thereby preventing the exploitation of the seabed by mineral interests? Finally, will defense interest insistence upon umimpeded passage result in the

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[1]The arguments presented in the Staff Report to the U.S. Senate's Committee on Interior and Insular Affairs and those of domestic critics have been collapsed. The result is what has been labeled here the "mineral interests" argument. While acknowledging the dangers of such a method, it is believed that this is the best way a synthesis of the issues can be achieved. See pp. 28-29.

developing countries gaining control of seabed mining and thus diminish U.S. security?

The mineral interests believe that the adoption of unimpeded passage makes naval forces free from law or legal restraints. They are supported in their position in that replacing the provisions for "innocent passage" weakens the amount of legal control that a state may exercise in its territorial waters when they form part of an international strait. In some cases, this legal advantage is the only way any type of control may be exercised. This is especially true of smaller countries without a sizable navy.

Defense interest would counter with the argument that "unimpeded passage" is not establishing any new legal right but merely protecting those that are presently enjoyed. It is because of the unilateral extension of sovereignty by coastal states and the requirement for international agreement on the breadth of the territorial sea that the need for "unimpeded passage" has become apparent. Formerly the straits closed by extensions of sovereignty had avenues of high seas through them. All that is being sought is the same high seas freedom of navigation that was previously enjoyed. The legal restraints that were

applied to shipping upon the high seas would continue in force.

Further, defense interests could reason that new legal advantages would be created for the littoral states without the concept of "unimpeded passage." Under the former high seas freedom which states exercised, suspension of navigation by a coastal state was not permitted. By replacing this freedom with "innocent passage," navigation for warships might be denied. Such denial could be on the basis that "innocent passage" is a term applied to territorial seas. Under Article 23 of the Geneva Convention on the Territorial Sea, warships may be denied passage through territorial waters. Therefore, permitting the coastal state the right to apply the concept of "innocent passage" to former areas of high seas would be giving them a legal right that previously was not theirs.

The second point of conflict between mineral and defense interests follows from the first. If the defense view is not legally sound, then international opposition to it might cause failure to reach international agreement for a law of the sea.

In the mineral industry's judgment, adoption of an internationally unacceptable policy of "unimpeded

passage," as advocated by defense, will preclude international agreement for a law of the sea thereby forestalling the exploitation of the seabed. The mineral side is correct to the extent that Strait and Archipelago States have certainly opposed the concept. Additionally, when the concept was first introduced at the U.N. Seabed Committee there was, in general, an unfavorable reaction to it.[1]

Also supporting the mineral industry's belief that U.S. policy will delay agreement is the strong correlation between international agreement to accept the principle of unimpeded passage and U.S. willingness to recognize extended claims to sovereignty.[2] Without insisting on unimpeded passage the chance for international agreement might be improved. A willingness to negotiate on all interests could possibly be more helpful in reaching an early settlement concerning seabed exploitation.

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[1]The concept was first introduced as "free transit." Because of the adverse reaction to the term, it was decided to use "unimpeded passage." Lynch interview. See also U.S., Congress, Senate, Committee on Interior and Insular Affairs, *The Law of the Sea Crisis*, pp. 9-10.

[2]See pp. 23-24.

In countering the mineral industry's case, defense interests could point to the complexity of the issues and the need to establish priorities for a negotiating position. There were over 100 agenda items submitted for the Third Law of the Sea Conference. In order for successful negotiations to take place, each item must be ranked according to its importance in fulfilling the needs of the country. To negotiate as if all interests were equal would not be effective.

Defense interests could advocate that the mineral industry is dissatisfied with negotiating priorities rather than legalities. Mineral interests mainly object to their subordination to the nation's traditional requirements for maximum mobility upon the sea. They seek to change the priorities of the negotiating list. These were established after due consideration of the interests involved was made by the highest civilian leadership.

The defense argument could continue by pointing out that the success or failure of a law of the sea conference is often a matter of subjective judgment based upon expectations. States have been seeking a successful international law of the sea for at least

the last 300 years.[1] To expect a single conference to resolve all disputes is unrealistic. All that might be hoped for under the circumstances is a better understanding of the issues and the establishment of a mechanism by which some of the less substantive issues might be resolved. It is an over-simplification to attribute the failure to reach agreement on any single issue.

Defense interest could question if failure to reach international agreement would necessarily mean impeding seabed exploitation. It could be reasoned that seabed extraction would continue under the present Geneva Convention for the Continental Shelf. Under this Convention, states have the right to exploit the seabeds as far out as their technology allows.

Finally, defense could argue that it is not clear if the concept of unimpeded passage would be overwhelmingly opposed. The defense interest could point to the support from other developed maritime nations, most notably the Soviet Union. Further, an analysis of the agenda items submitted for the Third Law of the Sea Conference shows that the majority of

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[1]Wolfgang Saxon, "A Complete Law of the Sea Has Eluded Nations for 300 Yrs.," *New York Times*, 21 June 1974, p. 12.

the countries expressed no specific opinion on the strait issue.[1]

The final disagreement between the mineral interest and defense interest concerns the mineral view that defense interests would negotiate mineral rights in exchange for support of "unimpeded passage." In so doing, control of mineral rights would be given to developing countries which could result in diminished U.S. security.

Supporting the contention of the mineral industry is the natural inclination of the military to advance pure military interest above all others. Of immediate concern to the military would be the ability to move naval units without interference.

It could be contended by the mineral interests that control over the seabed resources might play a more important role in national security than military mobility. This line of reasoning is borne out by the ever increasing U.S. dependency on imported petroleum to supplement U.S. production.[2] Also, the sea could

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[1]Most of the states submitted articles on the territorial seas rather than the straits themselves. United Nations, General Assembly, 28th Session, *Report of the Sea-Bed Committee*, vol. 5.

[2]See p. 18.

supply a substantial amount of certain raw materials that must now be imported.[1]

The defense position could use the same argument of increasing imports to emphasize the doubt that the U.S. would ever meet its own needs for raw materials solely from domestic sources, even if it exploited the seabed deposits. Therefore, mineral rights could be negotiated. It has already been noted that the U.S. is dependent on 7 of the 13 raw materials considered essential to industrial health.[2] By the end of this century it will require 12 of 13 raw materials to be imported.[3] The requirement to cooperate with developing countries is necessary and likely to grow.

In order to defend their own primacy in national policy, defense could stress the need for "unimpeded passage" for shipping. They could reason that any resources exploited either by developed or developing countries will require ships. Shipping provides the most economical means to move bulk material especially when employing the most direct routes (through international straits in many cases). Shipping must be

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[1]See p. 55. [2]See p. 56.

[3]Lester R. Brown, *World Without Borders* (New York: Vintage Books, 1973), p. 194.

protected during hostilities. Therefore, shipping and naval missions, which require mobility upon the sea, must take precedence over the actual mining of the seabed regardless which country does the exploitation.

This last discord between defense and minerals interests leads into the second area of domestic disagreement. Do defense interests actually require unimpeded passage to exercise missions? Two points underpinning this question are: First, is unimpeded passage required for a credible nuclear deterrence posture; second, do traditional naval missions require unimpeded passage?

Those who do not believe that unimpeded passage is required for nuclear deterrence would contend that even if nuclear submarines are not allowed to pass through international straits it is possible to position the submarines by circumnavigating the straits. Further, new missiles with increased ranges will make it unnecessary to use the straits to accomplish their mission. Finally, the nuclear submarine is not the only means available for a second strike. There may still be land based ICBMs as well as air deployed nuclear weapons to provide the needed deterrence.

The counter side to the view that unimpeded passage is not required for nuclear deterrence is that such passage would insure maximum use of all areas of the high seas. This would make submarine detection a difficult task thereby assuring continued deterrence. The more sea-room available for maneuver, if coupled with longer range SLBMs, would further assure that deterrent configured submarines could evade attack submarines while still remaining within launch range of their targets.

The argument could also cite the need for safety. Unimpeded passage would allow the nuclear submarine to transit international straits in a stable, submerged condition.

A final reason to support the need for unimpeded passage in nuclear deterrence is that it could limit the number of countries involved in the problem of deterrence. Unimpeded passage would preclude the involvement of littoral states, thereby reducing the scope and complexity of the problem.

The second aspect of this area of debate concerns the requirement of unimpeded passage through straits for traditional naval missions. The doubt for such need could be expressed as follows: peacetime

gunboat diplomacy (now called "naval presence") is not an effective way to protect a country's interests, but rather has the opposite effect. For example: what evidence was there that Task Force 74 had any affect on the Indo-Pakistan War of 1971, other than increasing India's hostility to the U.S.?[1] Further, by insisting upon the right to unimpeded passage we might be alienating more countries than could be influenced through naval presence. This could increase tensions thereby reducing peace and security.

To answer these charges it might be asserted by proponents of traditional naval missions that in the Indo-Pakistan War, naval presence countered that of Soviet Union's. It is equally easy to speculate that the presence may have prevented India from attempting to completely invade West Pakistan.

Another case which supports unimpeded passage for traditional naval missions is the utility of these missions in both war and peace. Military protection of shipping in war is a self-evident requirement which is fulfilled by the traditional naval mission of sea control. Sea control is hampered if straits become

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[1]See p. 49.

neutral waters in which sea control (i.e., attacks on shipping) cannot be exercised. However, it is too late to initiate ship construction when sea control becomes an actual necessity. The warship must already be in existence. This peacetime necessity for warships can be used as an effective adjunct to diplomacy.[1] Naval presence can be utilized to underscore a nation's interest in an area without involving it in an "in country" commitment. Denial of unimpeded passage may close off areas of the sea within which this mission might be exercised; for example, the Red Sea, Persian Gulf, and even the Mediterranean.

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[1]In testimony before the House Committee on Foreign Affairs' Subcommittee on the Near East and South Asia, the Honerable J. Owen Zurhellen, Jr. indicated the importance of naval visits to diplomacy: "As one who has spent his adult lifetime in the foreign service, I know myself the utility of having a naval visit. When you have a ship of your country come into a port and you can invite the mayor and the Governor down to come aboard and go through the ship, and you can have the band come ashore and give a concert, and the kids can go on board and eat ice cream cones, the people in the city and in the country can have a feeling that the United States is interested in us and it is here. I know the value of this kind of visit. . . ." U.S., Congress, House, Committee on Foreign Affairs, *Proposed Expansion of U.S. Military Facilities in the Indian Ocean, Hearings before the Subcommittee on the Near East and South Asia*, 93rd Cong., 2nd sess., 1974, p. 14.

A thin thread could be seen uniting the various points of conflict on the domestic level--the status quo versus change. Applied to the need for the nuclear deterrence mission and the traditional missions of the navy for unimpeded passage, it could be seen to reflect the reluctance of relinquishing the known advantage of high seas freedom to pass through the international straits for some unknown situation where in the littoral state controls the passage. This change versus the status quo is also in evidence in the dispute of defense needs versus mineral needs. The concept of "unimpeded passage" would give legal protection to the rights enjoyed before the changes in claims of sovereignty over the straits. The point of conflict over the unattainability of unimpeded passage indicates that the superpowers have united together to protect the status quo of their maritime supremacy. Additionally, it draws out the point that the mineral industry is seeking to change negotiating priorities thereby expanding its own influence in law of the sea matters. Finally, though contrary to the general trend, the fear by the mineral industry that adoption of unimpeded passage would sacrifice U.S. interests to developing countries is a fear to change the present status quo whereby

developed countries hold the advantage. Defense interests, while acknowledging the need for future cooperation, still maintain their traditional emphasis on the need for shipping and its protection.

International Points of Conflict

Four lines of argument can be identified in connection with international opposition to unimpeded passage. First, unimpeded passage is unknown to state practice. Second, unimpeded passage would derogate the sovereignty of the coastal state. Third, unimpeded passage would change the "balance of interests . . ." between maritime and coastal states. Finally, unitarian treatment should be applied to the sea.

Is unimpeded passage unknown to state practice? This has been touched upon when discussing the domestic conflict over the legality of unimpeded passage. It was pointed out that unimpeded passage was a new term in international law made necessary by extensions of sovereignty in international straits. It might be added here that by examining international law it was seen that the overall trend was to support the passage, even of warships, through international straits. The objection of littoral states would be the recognition of

this reality by establishing it as a principle of international law.

Would unimpeded passage derogate the sovereignty of the coastal state? In principle it would. This is true if sovereignty is defined as the supreme decision-making and decision-enforcing authority within a state's territory. Unimpeded passage would allow shipping to pass through a territory without it being under the control of the state.

International opponents to unimpeded passage could cite the need for more, rather than less state control over coastal waters. The new character of ships presents greater danger to the littoral states. Supertankers are a heretofore unknown pollution threat.

The counter argument could be that a state cannot exercise sovereignty over an area that it does not control. Unilateral declarations to extended sovereignty are not sufficient for the area to become a recognized territory of the sovereign state under international law.

Supporters for unimpeded passage could reason that states do not necessarily need jurisdiction over the sea to protect themselves from the dangers of new technology. International organizations already exist

for such protection. Stricter measures against ocean pollution are being written by the Inter-governmental Maritime Consultative Organization of the United Nations.

The third argument is that unimpeded passage would change the "balance of interests . . . ." This might be true in a legal sense. As indicated prior,[1] the present political realities would be incorporated into international law.

Supporters of unimpeded passage would contend that there is little, if any, shifting of interests. Maritime states enjoy practically complete freedom of passage even under the concept of "innocent passage." By removing the ambiguity of what is "innocent," freedom to navigate the seas in international straits would be clear and one source of world tension removed.

The final area of conflict is that between the Strait and Archipelago States' concept of unitarian treatment of the sea, particularly territorial waters, versus the functional division of the ocean as advocated by the developed countries, particularly the U.S.[2]

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[1]See p. 15.

[2]The unitarian approach is to divide the sea into areas primarily based on the degree of sovereignty

The unitarian approach has the advantage of simplicity to recommend it. All territorial waters, for example, whether along an open coast or in a strait, would be treated in the same manner.

The opposing position would be that the functional approach has been the long established practice

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exercised within that area. In high seas areas no state may claim sovereignty over the sea, seabed, living or non-living resources, or the air space above. In territorial seas a state has complete sovereignty except with respect to rights of ships to navigate through them. These ships have been granted the right of "innocent passage" so long as it is not prejudicial to the peace and security of the coastal state. The littoral state has the right to suspend such passage but it must apply the suspension to all ships without discrimination. Inland seas are the third area. The same sovereignty is exercised here as on land. Special uses of the ocean are not recognized under the unitarian approach.

A functional approach to ocean uses emphasizes the same subdivision of the ocean as mentioned for the unitarian approach but superimposes upon these a functional separation of the uses of the ocean. By doing this, a multitude of uses of the sea may be enjoyed without the extension of sovereignty necessitated by the unitarian approach. For example, State A wants to protect its fisheries from overfishing by other states. Its coastline is along an international strait whose width is 30 miles across. State A proclaims a 15 mile territorial sea, her neighbor across the strait does the same and international objections from maritime states begin to follow. On the other hand, State A could have used the functional approach by maintaining its present territorial sea limits (perhaps 3 miles) but declaring 12 mile contiguous special purpose zone for fishing. Now they would be faced with the objections of only those countries that fished those waters rather than all maritime interests. The net results for State A is the same, but the scope of conflict has been reduced.

of states for ocean uses. Territorial sea limits have been disassociated from such uses as fishing, customs, and air defense. Because of the multiplicity of issues, approaching them on a functional basis seems to offer the best chance of agreement between states. By using such an approach, both coastal and maritime interests may be protected. Unimpeded passage recognizes the special function that international straits serve for international communications whereas innocent passage does not.

As in the case of the domestic points of conflict, it may be helpful to view the international conflicts in terms of the status quo versus change. First, in connection with the view that unimpeded passage through international straits is unknown to state practice--this could be seen as an effort to change the high seas freedoms enjoyed in international straits to one of control by the coastal state. Secondly, the argument that unimpeded passage may derogate the sovereignty of the coastal state could be viewed as an effort to change present international law, which requires effective control over an area before sovereignty can be claimed, to one of a more liberal interpretation. The fear regarding the change

of the present balance of interest is actually concern over the further establishment of the status quo into international law by the concept of unimpeded passage. Finally, the status quo method of dealing with ocean issues has been through the use of a functional separation of ocean uses. The unitarian approach would change this.

A Paradigm

Samuel Huntington stated that "No theory can explain all facts. . . ."[1] But perhaps theory can assist in understanding a portion of the conflicts involved in the straits and security issue.

Hans Morganthau has espoused the "realist theory" of politics which concerns itself with "human nature as it actually is" not as it should be. According to Morganthau, politics is best understood if we look at political actions in terms of interests defined as power. Power being "man's control over the minds and actions of other men." According to Morganthau, "Domestic and international politics are but two different manifestations of the same phenomenon: the struggle for power."[2] Further:

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[1]Huntington, p. vii. [2]Morganthau, p. 40.

> All politics, domestic and international, reveals three basic patterns; that is all political phenomena can be reduced to one of three basic types. A political policy seeks either to keep power, to increase power, or to demonstrate power.[1]

A policy that seeks to keep power is called a policy of the "status quo." That which aims to increase power is one which Morganthau defines as "imperialism" but is less confusing here if identified as the "policy for change." A "policy of prestige" is one that seeks to demonstrate power.

Morganthau, when addressing the subject of ideologies associated with the various power patterns, believes that those who practice a policy of the "status quo" will often use pacifist terms as well as invoking international law. "Peace" is a favorite word to advocates of the "status quo" because by avoiding war they can maintain the advantages they presently enjoy. International law is also a favorite ideological device employed because it recognizes the present distribution of power.

The practitioners of the "policy for change" often cite the requirement of "justice," "anti-imperialism," and "equality," which Morganthau equates to claims of sovereignty.

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[1]Ibid.

Such a paradigm fits well with the events we have seen in connection with national security and the international straits. Instead of stating that defense interests or national security interests have dictated what U.S. policy should be in connection with the law of the sea, if it was asserted that the policy of the "status quo" had been adopted, the facts would tend to support it. The mineral industry (including petroleum) could be seen as adopting an increasing power pattern or the "policy for change" by seeking to extend their power on the domestic level by challenging the traditional primacy of naval and shipping interests in ocean uses.[1]

Morganthau's concepts are even more inviting when they are applied on the international level. Here it seems plainly evident that the United States has adopted the policy of the "status quo" for the use of international straits. On the other side, the Strait and Archipelago States are concerned with "equality" and "sovereignty," ideologies associated with the "policy for change." It is logical for these States to

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[1]Fishing, although a traditional use, is not considered here because the industry is split on which is most desirable--state control or freedom from state control of the sea.

do so because they could improve their political power by changing the "status quo" in regard to freedom of passage.

At first appearance, there is at least one item which does not seem to be explained by the realist theory when applied to the straits issue. Why have the Strait and Archipelago States sought sanction of their position by international law when this would be a typical tactic of the status quo nation? A reply might be: because the present law is imprecise and allows a variety of interpretations including one that is favorable to the opponents of unimpeded passage.

Conclusion

The primacy of unimpeded passage in U.S. policy for the international law of the sea can best be understood as a maintenance of the political "status quo." This is true for both U.S. domestic politics as well as international politics. On the domestic level, it recognizes the traditional primacy of naval and shipping interests in law of the sea matters. It also appears to be in the best interests of U.S. security because it guarantees freedom of navigation to shipping while allowing the U.S. to exercise its naval strength

in both deterrent and traditional naval missions. Although argued to the contrary, placing primacy on unimpeded passage would not necessarily mean a derogation of other U.S. interests in the sea. On the international level, the policy of unimpeded passage recognizes the coincidence of Soviet and American interests and in so doing serves to lessen tensions and increases the security of all nations.

For the present, unimpeded passage through international straits appears to be in the best interest of the United States because it realistically reflects political power. It recognizes the traditional importance of shipping and its protection for a nation of world trade.

Unimpeded passage, again because it realistically reflects political power, appears to be in the best interest of world peace. In attempting to maintain the "status quo" it emphasizes the avoidance of war.

Caution must be exercised in the policy of unimpeded passage. Awareness must be kept for changing power relationships. This is particularly true of the developing nations possessing vital resources. These represent the forces for change and their growing political power must be continually evaluated. The

forces for change must be accommodated if in so doing an overall relaxation of world tensions can be achieved and the security of all nations advanced.

Areas for Further Study

This study has been made on the basis of documents available prior to the convening of the Third Law of the Sea Conference. Primary sources covering the Conference have, as yet, not been made available. A thorough evaluation of this material must be made in order to determine if there is serious opposition to the concept of unimpeded passage from the growing number of more powerful developing countries. Morganthau has cautioned that awareness of relative power must be maintained. Failure to do this has involved nations in two world wars this century. If such changes have occurred during the Third Law of the Sea Conference, accommodation would be in order if the net effect would be to reduce world tensions.

Technological advances must be continuously appraised as to their effect on the straits issue. This is especially true as it applies to the military necessity of such transit. Foremost in mind is the recent launch of an ICBM from an aircraft. Further development

of this form of deterrent would weaken the case for the need of extensive ocean areas to maintain the assured second strike capability of the SLBM.

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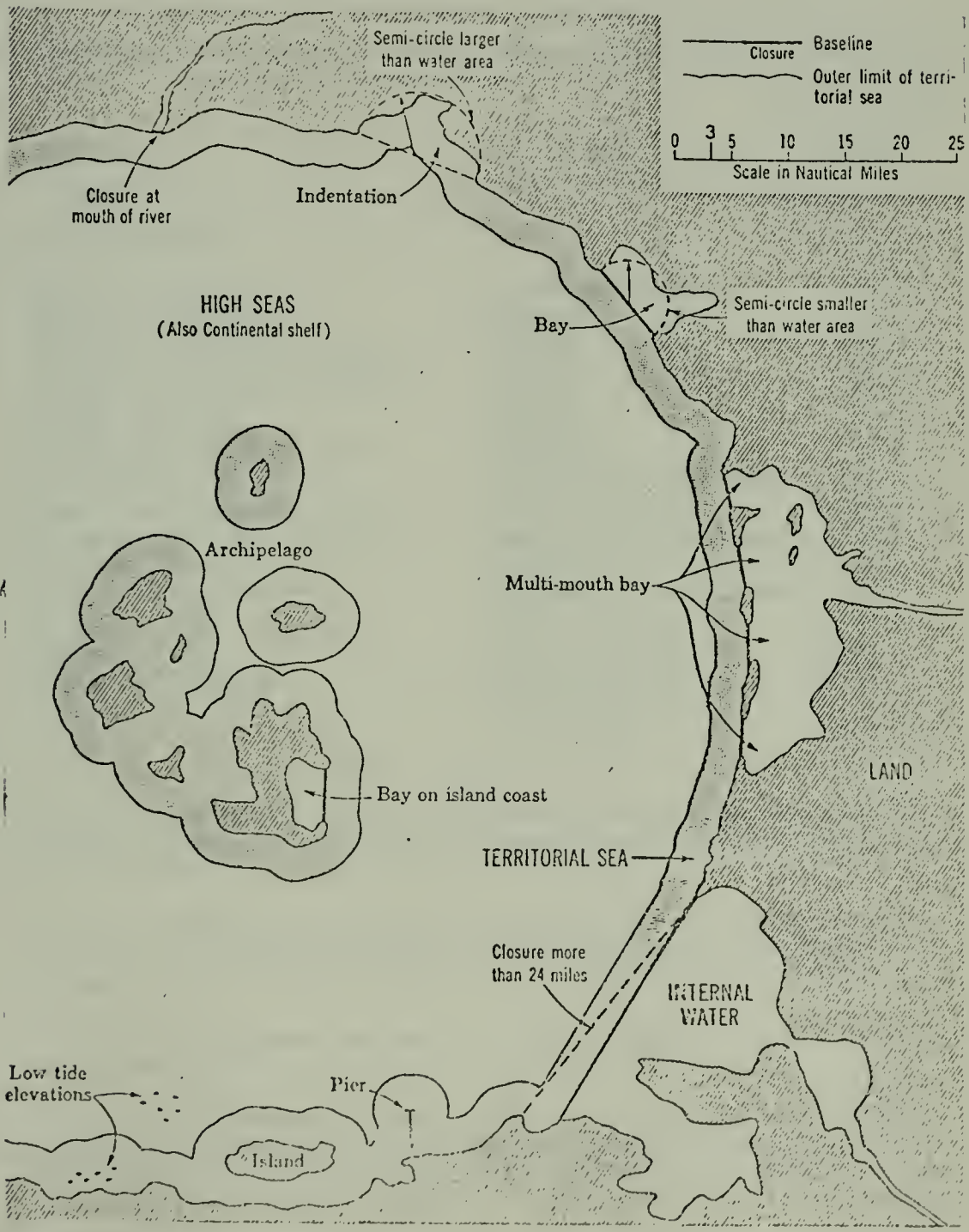
APPENDICES

APPENDIX A

Relationship of Sea Terms

SOURCE: U.S. Department of State, Bureau of Intelligence and Research, *Sovereignty of the Sea* (Washington, D.C.: Government Printing Office, 1969).



APPENDIX B

Widths of Selected Straits and Channels

Passage	Sovereignty (on either side)	Least Width (in nautical miles)
Anglo-America		
Robeson Channel	Canada/Denmark	10
Hudson Strait[1]	Canada	55
Strait of Belle Isle	Canada	9
Jacques Cartier Passage	Canada	15
Gaspe Passage	Canada	38
Cabot Strait	Canada	57
Northumberland Strait	Canada	7
Florida Strait[2]	United States/Cuba	82
Santa Barbara Channel	United States	11
Strait of Juan de Fuca	United States/Canada	9
Hecate Strait	Canada	24
Dixon Entrance	United States/Canada	27
Amukta Pass	United States	37
Unimak Pass	United States	10
Shelikof Strait	United States	20
Bering Strait[3]	United States/ U.S.S.R.	19

SOURCE: U.S., Department of State, Bureau of Intelligence and Research, *Sovereignty of the Sea*, pp. 28-29.

[1]Entrance to Hudson Strait between Resolution Island and Button Islands (off Labrador Coast), 37 miles.

[2]Distance between Bimini (Bahamas) and Florida, 43 miles.

[3]Distance given in table is that between Big Diomede Island (U.S.S.R.) and Mainland Siberia. Other distances: (1) Between Little Diomede Island (U.S.) and Big Diomede Island, 2 miles. (2) Between Little Diomede

APPENDIX B--*Continued*

Passage	Sovereignty (on either side)	Least Width (in nautical miles)
Latin America		
Yucatan Channel[4]	Cuba/Mexico	105
Northwest Providence Channel	United Kingdom	26
Northeast Providence Channel[5]	United Kingdom	29
Crooked Passage	United Kingdom	26
Mayaguana Passage[6]	United Kingdom	39
Caicos Passage	United Kingdom	35
Windward Passage	Cuba/Haiti	45
Turks Island Passage	United Kingdom	13
Mouchoir Passage	United Kingdom	23
Mona Passage	U.S./Dominican Rep.	33
Virgin Passage[7]	United States	8
Anegada Passage[8]	United Kingdom	48
Guadeloupe Passage	France/United Kingdom	28

Island and Mainland Alaska, 20 miles. (3) Between Mainland Alaska and Mainland Siberia, 45 miles.

[4]Distance given is that from Contoy an island about 6 miles off the Yucatan coast.

[5]Distance between Great Abaco Island and Royal Island, off Eleuthera coast, 26 miles.

[6]Distance between Acklins Island and Plana Cays, 12 miles; between Plana Cays and Mayaguana Island, 21 miles.

[7]Distance given in table is from Culebrita, an inlet east of Culebra.

[8]Distance between Sombrero and Horse Shoe Reef, a breaking reef running southeast of Anegada and attached thereto, is 42 miles.

APPENDIX B--*Continued*

Passage	Sovereignty (on either side)	Least Width (in nautical miles)
Latin America (Contd)		
Dominica Channel	France/United Kingdom	16
Martinique Passage	France/United Kingdom	22
St. Lucia Channel	France/United Kingdom	17
St. Vincent Passage	United Kingdom	23
Dragon's Mouth	Trinidad and Tobago/Venezuela	6
Serpent's Mouth	Trinidad and Tobago/Venezuela	8
Aruba-Paraguana Passage	Netherlands/ Venezuela	15
Estrecho de la Maire	Argentina	16
Strait of Magellan	Argentina/Chile	2
Europe		
Bosporus	Turkey	*
Dardanelles	Turkey	*
Kárpathos Strait	Greece	23
Kásos Strait	Greece	26
Strait of Otranto	Albania/Italy	41
Strait of Messina	Italy	2
Malta Channel	Italy/United Kingdom	44
Strait of Sicily	Italy	55
Strait between Elba and Italy	Italy	5
Strait between Corsica and Elba	France/Italy	27
Strait of Bonificio	France/Italy	6
Freu de Minorca	Spain	20

*Less than a nautical mile.

APPENDIX B--*Continued*

Passage	Sovereignty (on either side)	Least Width (in nautical miles)
Europe (Contd)		
Strait of Gibraltar	Morocco/Spain	8
Strait of Dover	France/United Kingdom	18
The Solent	United Kingdom	2
St. George's Channel[9]	Ireland/United Kingdom	42
North Channel	United Kingdom	11
Little Minch	United Kingdom	10
North Minch[10]	United Kingdom	20
Pentland Firth[11]	United Kingdom	5
The Hole	United Kingdom	23
Skagerrak	Denmark/Norway	61
Ore Sund	Denmark/Sweden	2
Bornholmsgat (Hambarne)	Denmark/Sweden	19
Kalmar Sund	Sweden	2
Entrance to Gulf of Bothnia[12]	Finland/Sweden	17
Entrance to Gulf of Finland	Estonia/Finland	17

[9]Distance given in table is between mainlands; between South Bishop Rock (Wales) and Tuskar Rock (Ireland), 36 miles.

[10]Between Shiant Island and mainland of Scotland, 17 miles.

[11]Between Pentland Skerries and mainland of Scotland, 4 miles. Stroma Island, which also lies in Pentland Firth, is not considered in the computation.

[12]Distance given in table approximately correct; several small islands in strait makes precise measurements difficult.

APPENDIX B--*Continued*

Passage	Sovereignty (on either side)	Least Width (in nautical miles)
Far East		
Kuril Strait	U.S.S.R.	6
Etorofu Kaikyo	U.S.S.R./U.S.S.R. Administration	22
Kunashiri Suido	U.S.S.R. Administration	12
Shikotan Suido	U.S.S.R. Administration	12
Taraku Suido	U.S.S.R. Administration	6
Notsuke	Japan/U.S.S.R. Administration	9
Soya Kaikyo (La Perouse Strait[13]	Japan/U.S.S.R.	23
Tsugara Kaikyo	Japan	10
Eastern Chosen Strait	Japan	25
Western Chosen Strait[14]	Japan/Korea	23
Cheju Haehyop	Korea	12
Maemul Suido	Korea	13
Huksan Chedo	Korea	8
Pohai Strait	China	22
Osumi Kaikyo (Van Dieman Strait)	Japan	16
Tokara Kaikyo (Colnett Strait)	Japan	22
Formosa Strait[15]	China	74
P'enghu Shuitao (Pescadores Channel)	China	17

[13]Distance between Hokkaido and Ostrov Kamen' Opasnosti, 20 miles; on to Sakhalin, 9 miles.

[14]Measured from island off the coast of Korea.

[15]Distance is 68 miles if offshore islands are taken into consideration.

APPENDIX B--*Continued*

Passage	Sovereignty (on either side)	Least Width (in nautical miles)
Far East (Contd)		
Lema Channel	China/United Kingdom	6
Hainan Strait	China	10
Southeast Asia		
Babuyan Channel	Philippines	15
Polillo Strait	Philippines	10
Maqueda Channel	Philippines	4
Verde Island Passage[16]	Philippines	4
San Bernardino Passage	Philippines	8
Mindoro Strait[17]	Philippines	20
Surigao Strait	Philippines	10
Basilan Passage	Philippines	7
Balabac Passage[18]	Malaysia/ Philippines	27
Sibutu Passage	Philippines	18
Bangka Passage	Indonesia	19
Selat Grehund	Indonesia	10
Makassar Strait[19]	Indonesia	62
Koti Passage	Indonesia	10
Serasan Passage	Indonesia	23

[16]Distance between Luzon and Verde Island, 3 miles.

[17]Distance between Mindoro to Apo Reef, 15 miles.

[18]Distance given in table is that measured between Balabac, largest of the major islands south of Palawan, and Balambangan, closest of the major islands of Sabah.

[19]Distance between Borneo and Pulau Tuguan, 55 miles.

APPENDIX B--*Continued*

Passage	Sovereignty (on either side)	Least Width (in nautical miles)
Southeast Asia (Contd)		
Api Passage	Indonesia	16
Selat Ombai	Indonesia/Portugal	16
Selat Roti	Indonesia	6
Selat Sape	Indonesia	8
Selat Alas	Indonesia	5
Selat Lombok	Indonesia	11
Selat Bali	Indonesia	2
Selat Sunda	Indonesia	12
Gaspar Strait[20]	Indonesia	8
Selat Bangka	Indonesia	8
Berhala Strait[21]	Indonesia	9
Strait of Malacca (North)	Indonesia/ Malaysia	20
Strait of Malacca (South)	Indonesia/ Malaysia	8
Oceania		
Alenuihaha Channel	United States	25
Alalakeiki Channel	United States	6
Kealaikahiki Channel	United States	15
Auau Channel	United States	8
Pailolo Channel	United States	8
Kalohi Channel	United States	8
Kaiwi Channel	United States	22
Kauai Channel	United States	63
Kaulakahi Channel	United States	15
Apolima Strait	Western Samoa	4

[20]Distance given in table is that measured across Macclesfield Strait portion of Gaspar Strait.

[21]Distance from Sumatra to Berhala, in middle of strait, 9 miles; from Berhala to Singkep, 10 miles.

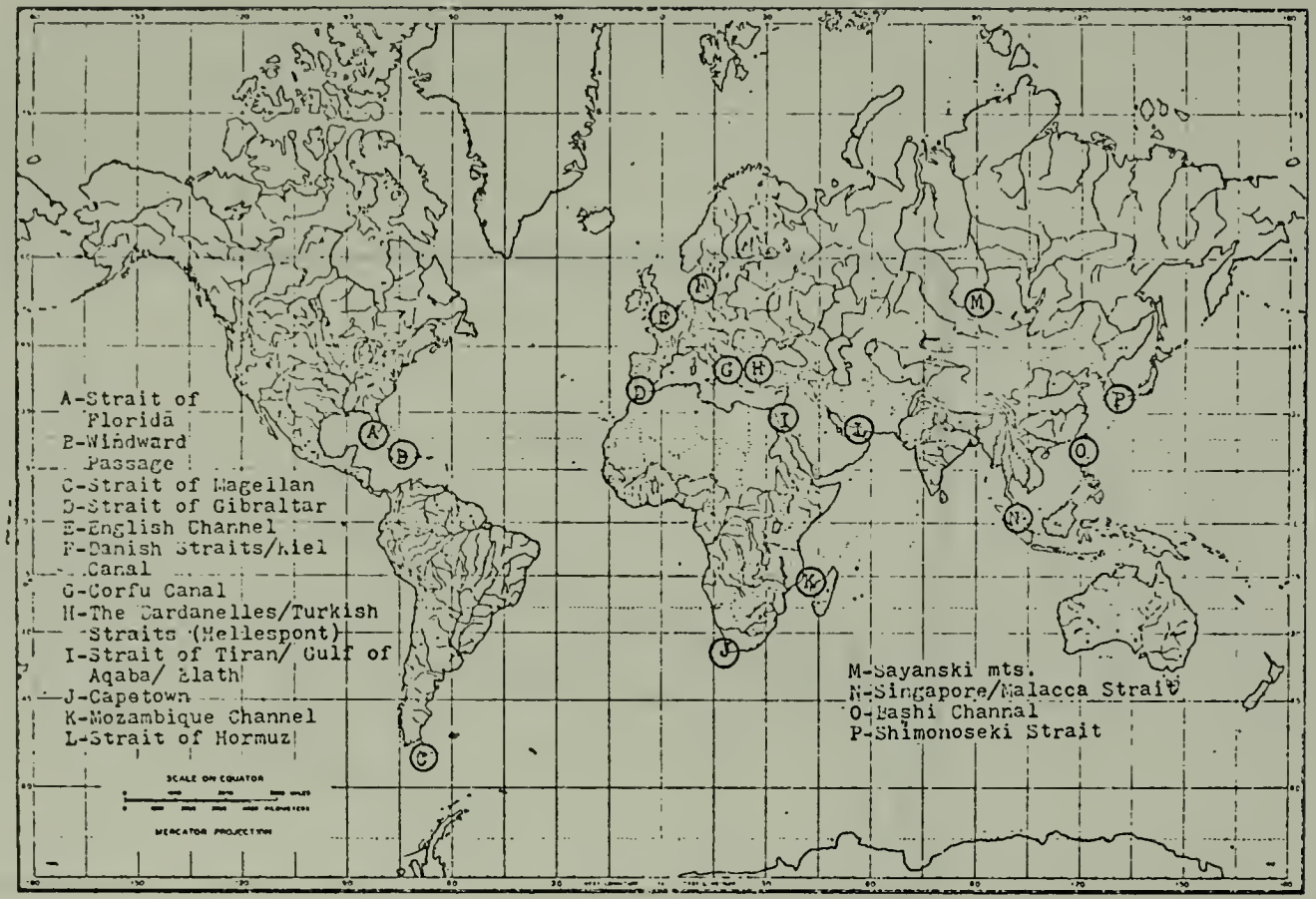
APPENDIX B--*Continued*

Passage	Sovereignty (on either side)	Least Width (in nautical miles)
Oceania (Contd)		
Indispensable Strait[22]	United Kingdom	19
Manning Strait	United Kingdom	6
Bougainville Strait	United Kingdom	15
St. George's Channel	Australia	8
Goschen Strait	Australia	7
Dampier Strait	Australia	13
Vitiaz Strait	Australia	24
Cook Strait	New Zealand	12
Banks Strait	Australia	8
Floveaux[23]	New Zealand	15
Miscellaneous		
Kara Strait	U.S.S.R.	19
Palk Strait	Ceylon/India	19
Strait of Hormoz	Iron/Muscat and Oman	21
Bab el Mandeb[24]	France/Yemen	14

[22]Distance given in table is that measured between Malaita and Nura Islands, the latter 10 miles from Guadalcanal.

[23]Distance between Centre Island (4 miles off South Island) and Stewart Island at west end of strait, 13 miles. At east end of strait the recommended channel for ships between Dog Island on the north and Ruapuke on the south, the channel is 11 miles wide.

[24]Distance given in table is between mainlands; between Perim Island and African continent, 11 miles; between Perim Island and French islets to south, 9 miles.



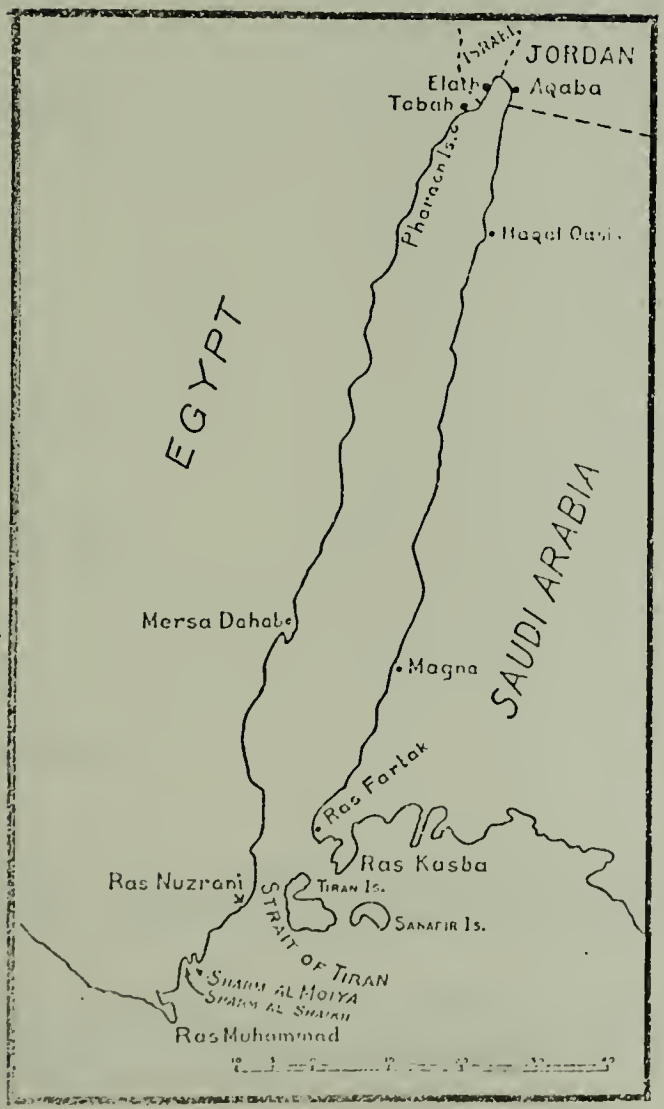
APPENDIX C

Map of the World

APPENDIX D

The Gulf of Aqaba

SOURCE: Selak, p. 662.



APPENDIX E

The Breadth of the Territorial Sea[1] (as of October, 1969)

Country	Claim
Albania	10
Algeria	12
Argentina	200
Australia	3
Barbados	3
Belgium	3
Brazil	12
British Honduras	3
Brunei	3
Bulgaria	12
Burma	12
Cambodia	12
Cameroon	18
Canada	3
Ceylon	6
Chile	50 kms.
China, Communist	12
China, Republic of	3
Colombia	12
Comoro Islands	3
Congo (Brazzaville)	N.A.
Congo (Kinshasa)	3
Costa Rica	3
Cuba	3
Cyprus	12
Dahomey	12
Denmark	3
Dominican Republic	6
Ecuador	200

SOURCE: U.S., Department of State, Bureau of Intelligence and Research, *Sovereignty of the Sea*, pp. 28-29.

[1]As claimed by selected states in nautical miles unless otherwise indicated. One nautical mile equals 1.15 statute miles, or 1.85 kilometers.

APPENDIX E--*Continued*

Country	Claim
El Salvador	200
Equatorial Guinea	6
Ethiopia	12
Fiji	3
Finland[2]	4
France	3
French Guiana	3
French Polynesia	3
French Territory of Afars and Issas	3
Gabon	12
Gambia, The	6
Germany, East	3
Germany, Federal Republic of	3
Ghana	12
Gibraltar	3
Greece	6
Guatemala	12
Guinea	130
Guyana	3
Haiti	6
Honduras	12
Hong Kong	3
Iceland	4
India	12
Indonesia	12
Iran	12
Iraq	12
Ireland	3
Israel	6
Italy	6
Ivory Coast	3
Jamaica	3
Japan	3
Jordan	3
Kenya	12
Korea, North	12
Korea, Republic of	3
Kuwait	12
Lebanon	N.A.

[2]Three miles around the Aaland Islands.

APPENDIX E--*Continued*

Country	Claim
Liberia	12
Libya	12
Madagascar	12
Malaysia	12
Maldives	3
Malta	3
Mauritania	12
Mauritius	3
Mexico	9
Monaco	3
Morocco	3
Muscat and Oman	3
Nauru	3
Netherlands	3
New Caledonia	3
New Zealand	3
Nicaragua	3
Nigeria	12
Norway	4
Pakistan	12
Panama	200
(Panama Canal Zone)	3
Papua and New Guinea	3
Peru	200
Philippines[3]	--
Poland	3
Portugal	No Claim
Puerto Rico	3
Reunion	3
Romania	12
Ryukyu Islands, Southern	3
Saudi Arabia	12
Senegal	12
Seychelles	3

[3]Waters within baselines joining appropriate points of the outermost islands are considered internal waters; waters between these baselines and the treaty limits of the Philippines (1898, 1900, and 1930) are considered territorial waters.

APPENDIX E--*Continued*

Country	Claim
Sierra Leone	12
Singapore	3
Somalia	12
South Africa	6
Southern Yemen	N.A.
South-West Africa	6
Soviet Union	12
Spain	6
Spanish Sahara	6
Spanish Territories in northern Morocco	6
Sudan	12
Surinam	3
Sweden	4
Syria	12
Tanzania	12
Thailand	12
Togo	12
Tonga	3
Trinidad and Tobago	3
Tunisia[4]	6
Turkey	6
United Arab Republic	12
United Kingdom	3
United States	3
Uruguay	12
Venezuela	12
Viet-Nam, North	12
Viet-Nam, Republic of	3
Western Samoa	3
Yemen	12
Yugoslavia	10

[4]Follows the 50-meter isobath for part of the coast; maximum 65 miles.

ABSTRACT

ABSTRACT

Since the end of World War II, nations have tended to extend their sovereignty to areas of the sea that were previously *res communis*. This extension of sovereignty when exercised by states located on straits used for international commerce or by states that were archipelagic in nature produced conflict between maritime nations and littoral states. The maritime states, especially the U.S. and the Soviet Union, have argued that "unimpeded passage" through international straits is needed for national security. First, this passage allows for the continued exercise of naval missions such as nuclear deterrence. Secondly, "unimpeded passage" assures non-interference with shipping. The littoral states desire more control over ships passing their coasts. They cite such dangers to their security as oil pollution and nuclear hazards.

The policy of placing "unimpeded passage" as a primary element in U.S. national policy for the law of the sea has been attacked domestically. U.S. opponents, particularly the seabed extractive industry, believe that such a policy represents a subjugation of more important interests to that of Department of Defense

interests. They argue that national security could be weakened by failure for international agreement as to ocean uses.

The thesis of the paper is that national security interests of America and the peace of the world are best served through "unimpeded passage" of international straits. The thesis is advanced by setting forth the U.S. policy, the objections to that policy, and the facts supporting that policy. Special emphasis is placed on an examination of the trends in international law as well as the military necessity for the policy. A synthesis is made of the points of conflict in an attempt to join the facts with political theory.

The primacy of "unimpeded passage" in U.S. policy for the international law of the sea can best be understood as a maintenance of the political "status quo." This is true for both U.S. domestic politics as well as international politics. For the present, "unimpeded passage" through international straits appears to be in the best interest of the United States and for the peace of the world, because it realistically reflects political power. Caution must be maintained in such a policy. Technology may eliminate the military need for such passage. Awareness must be kept of the

increasing power of developing countries with vital resources. These are the forces for change and their growing political power must be continually evaluated so that an overall reduction of tension can be achieved.

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